THE
MODERN LAW REVIEW

Volume 24 November 1961 No. 6

OBITUARY

Mr. R. Hilary Stevens

We regret to record the death of Mr. R. Hilary Stevens of Messrs. Stevens & Sons, Ltd., the publishers of the *Modern Law Review*. Ever since 1946, when his company accepted responsibility for the publication of the *Review*, Mr. Stevens had taken a keen personal interest in its development, and in so far as its increasing prosperity has depended on the technical competence of its production he could claim a large part of the credit for the result.

Mr. Stevens came of a very old family of law publishers, and we understand that his untimely death will bring this family connection with publishing to an end, though, of course, for some years the imprint has been closely associated with that of Messrs. Sweet & Maxwell, Ltd., under whose aegis it will continue. During his relatively short career as a publisher Mr. Stevens had effected marked improvements in the layout and printing of the volumes for which his concern was responsible, such as their well-known series, the *Library of Shipping Law*. His loss will be felt not least by lawyers who find pleasure in the appearance of the books which they use.

With the Editorial Committee of the *Review* Mr. Stevens was on terms of personal friendship rather than those of a business footing. We all knew that we could rely upon his sympathy and assistance in connection with any new project or development, and we shall miss his courteous co-operation on which we had come to rely so much.

THE EXCLUSION OF SECTION 12 (1) OF THE SALE OF GOODS ACT

Some years ago the present writer attempted an examination [1] of the validity of arguments put forward by some textbook writers [2] in support of their contention that, despite the apparent freedom given by the opening words of section 12 of the Sale of Goods Act, 1893, it was not possible to exclude by an appropriate exemption clause the condition as to good right to sell normally implied in a contract of sale by section 12 (1). It will be recalled that the relevant statutory provisions are in the following terms:

> " In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—
>
> (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass."

It is not now proposed to recapitulate the suggestions made in the previous article in support of the view that it was in fact possible to exclude the term implied by the subsection but rather to note and comment on developments in the argument since the appearance of that article.

In both *Atiyah on Sale of Goods* [3] and the new edition of *Cheshire and Fifoot on Contract* [4] the contention is forcibly put that any attempt to exclude section 12 (1) would produce a conflict with section 1 (1) of the Act which defines a contract of sale as follows:

> " A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration, called the price."

In the light of this provision the learned authors of *Cheshire and Fifoot on Contract* now say [5]:

> " . . . it is absurd to permit a seller to contract out of his duty to pass ownership to the buyer. Once more he comes into conflict with section 1 of the Act; and from the obligations of this section even a clause as comprehensive as that in *L'Estrange* v. *Graucob* [6] cannot absolve him. To suppose

1 " The Condition as to Title in Sale of Goods " (1957) 20 M.L.R. 236.

2 Cheshire and Fifoot, *Contract*, 4th ed., p. 137. Sutton and Shannon, *Contract*, 5th ed., pp. 307–308 (but see p. 278).

3 p. 42. The author merely says that such a transaction does not answer to the definition of a sale. He does not discuss the possible legal effects.

4 5th ed., p. 136.

5 *Ibid.*

6 [1934] 2 K.B. 394.

> otherwise would be to admit a hopeless incongruity. On the one hand he would be promising to sell the goods and on the other insisting that he was not passing the property and therefore not making a sale."

A number of points of comment seem to arise here. Firstly, repugnancy between the main provisions of a contract and exemption clauses has been used by the courts as a justification for depriving the exemption clauses of legal effect,[7] but the case put by the learned authors does not cover the really crucial point which must be determined in deciding whether or not it is possible to contract out of the obligation implied by section 12 (1). This is not the case of a man saying he is selling and then in the next breath flatly denying that he intends property to pass but the case where the seller says that property may pass but refuses to guarantee that it will. It is submitted that in this second case contradiction or repugnancy will only occur if section 1 (1) requires that the agreement to transfer property should always be absolute or unconditional. If that is not so a seller who enters into a conditional or contingent agreement to transfer property could nonetheless be said to " agree " to transfer property and thus satisfy the subsection. The suggestion that the subsection is satisfied by a conditional or contingent agreement seems to be borne out by section 1 (2) which says that a contract of sale may be absolute or conditional and section 5 (2) which says:

> There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

Here are two situations contemplated by the Act where there is no absolute promise to pass property and yet in each case the transaction is properly called a sale. Indeed if it were the case that section 1 (1) required an absolute promise to transfer property in all contracts of sale then the condition implied by section 12 (1) would merely be so much repetitive verbiage.[8] Thus the mere use of words " sell " or " sale " do not appear to import an absolute agreement to transfer property. Ordinarily section 12 (1) will operate to give the purchaser the benefit of an absolute promise to transfer property but should the condition normally implied by that subsection be aptly excluded it is suggested that as the law at present stands the seller is entitled to the full benefit of any exemption clause in this regard, at least provided there is no fraud or wilful default on his part.

This argument that section 1 (1) is not to be treated as postulating an absolute promise to transfer property as an essential

[7] A recent example is *Lanitis* v. *Kyodo Shoji* [1956] 2 Lloyd's Rep. 176.

[8] See Stoljar (1952) 15 M.L.R. 425 at p. 426, n. 8. " If the transfer of property is, *by definition*, the main purpose of a contract of sale, do not the implied undertakings as to title in section 12 become redundant? " This difficulty is removed if the possibility of transfer rather than actual transfer is regarded as of the essence of sale.

characteristic of a contract of sale has been put in somewhat different terms by Mr. Thornely.[9] After first asking whether the definition of a contract of sale in section 1 (1) means anything more than that a contract is not one to which the Sale of Goods Act applies unless its *object* is to transfer the general property in return for a price, thus distinguishing it from contracts having other objects, such as pledge, mortgage, hire, provision of work and so forth, he continues as follows:

> If the parties fail to achieve that object because the seller proves to have no, or only some limited, interest in the goods, then the buyer will have his remedies for breach of the undertakings as to title implied by section 12—but that does not mean that the contract is not one whereby the seller "*agrees* to transfer the property." If this be correct all difficulty about expressly excluding the condition normally implied by section 12 vanishes and the opening words of that section can mean what they say. Why should not a contract be a contract of sale within the Act simply because the seller's offer was "I will sell you this car which I believe to be mine; but if I should prove to have no title to it, you shall not be entitled to sue me for return of the price or damages?"

It is suggested that exactly the same result should follow if the agreement was in the form "I will sell you this car, no term as to title to be implied" or "all implied conditions and warranties to be excluded" or the like.

The relevant passage in *Atiyah on Sale of Goods* [10] in which this problem is discussed reads as follows:

> The opening words of section 12 (1) seem clearly to contemplate the possibility of the parties contracting out of the implied conditions as to title. Thus a person may agree to buy goods from a bona fide possessor expressly subject to all defects in title. But the definition of a contract of sale by section 1 (1) as a contract in which *the property* is transferred or to be transferred, seems scarcely reconcilable with such a possibility so long as we are compelled to interpret this as meaning the absolute property. In other words if a limited title is sold *Rowland* v. *Divall* compels us to say that this is not a contract for the sale of goods within the meaning of the Act.[11]

With respect this seems to miss the point that a contract whereby a seller agrees to transfer property in goods, if the property

[9] [1958] C.L.J. at p. 125 (review of Atiyah, *Sale of Goods*).

[10] At p. 42.

[11] It is admitted that, provided the transaction takes effect according to its terms, the question whether or not it is properly called a sale may be largely a matter of words, especially since the courts have shown themselves to be very ready to imply in contracts analogous to sale, terms as to fitness for purpose, merchantable quality and the like modelled on those implied in contracts of sale by the Act. But there might be cases in the interpretation of statutes and other documents where the correct terminology would be vital.

is his to transfer, may still be an agreement relating to the general property. A seller may agree to transfer the general property if he has it to transfer or agree to transfer the general property but refuse to undertake that it is his to transfer. If it be accepted that section 1 (1) does not require an absolute promise to transfer property, and the other requirements of the subsection are satisfied, there seems to be no reason why agreements of the types outlined should not be regarded as sales of goods. The point seems to be that it is not the property but the agreement to transfer that is qualified.

Even if it is not conceded that section 1 (1) is satisfied by a mere contingent or conditional promise to transfer property it is submitted that nevertheless the argument for allowing the exclusion of section 12 (1) still stands. The absolute terms of section 1 (1) would have to be qualified by exceptions in order to allow sections 1 (2) and 5 (2) their proper fields of operation.[12] If exceptions are to be allowed for these subsections there seems no good reason why an exception should not be allowed for the opening words of section 12 and if such an exception is allowed the argument from contradiction no longer appears to hold.

Another controversial point raised by Messrs. Cheshire and Fifoot appears in the following passage [13]:

> " . . . a person, if he likes, may deliberately take his chance of ownership. If B has an old bureau in his possession, A may agree to pay money for it ' whoever is its owner.' This is certainly a valid contract. But it is not a contract of sale. It does not answer the definition contained in section 1 of the Sale of Goods Act. The parties are agreeing to the transfer, not of property, but of possession only."

It is, of course, possible that in a situation such as that envisaged by the learned authors, the parties do intend merely to transfer possession and in such a case the concluding sentence of the quoted passage is unexceptionable. It is submitted, however, that such a transaction is capable of being interpreted as a payment by A for the chance that B is the owner and the parties do intend the property to pass if B is in fact the owner. Then, if it be accepted that a conditional promise to pass property is enough to constitute a sale, such an agreement seems to satisfy the requirements of section 1 (1). There is an agreement, albeit contingent, to transfer property for a money consideration. The same result follows if one treats the opening words of section 12 as constituting an exception to an otherwise general requirement of an absolute promise. The contract would fall into a class which, by exception to the general rule, is

12 For authorities on the principle that a statutory provision of narrow operation which appears to contradict a wider provision of the same statute should be read as an exception to the wider provision, see Maxwell, *Statutes*, 10th ed., p. 172; Craies, *Statutes*, 5th ed., pp. 205–206; (1957) 20 M.L.R. pp. 240–241.

13 *Law of Contract*, 5th ed., p. 136, n. 2.

still properly called a contract of sale in spite of the fact that there is no absolute promise to pass property.[14]

Another contribution to the controversy surrounding the possible exclusion of section 12 (1) is made by Mr. A. G. Guest in his recent article entitled " Fundamental Breach of Contract." [15] He there argues [16] that since in *Rowland* v. *Divall* [17] the Court of Appeal held that breach of the condition implied by section 12 (1) amounted to more than mere breach of condition but also to total failure of consideration therefore an exemption clause simply excluding the implied condition would not be effective to protect a seller who failed to give a good title. He would, so Mr. Guest contends, have to go further

> " . . . and show that the agreement, as a whole, had as its main purpose a quite different type of transaction by which the buyer agreed to purchase merely the *chance* that the seller might or might not have the property in the goods sold. Unless the seller could do this, he would be liable for his failure to perform the ' whole object ' of the agreement."

If it be accepted, however, as has been earlier argued, that section 1 (1) of the Act is satisfied by a non-absolute agreement to transfer property and that the condition implied by section 12 (1) is necessary to render absolute what otherwise might be only conditional then Mr. Guest's contentions do not appear to dispose of the matter. In neither *Rowland* v. *Divall* nor *Butterworth* v. *Kingsway Motors* was there any attempt to exclude section 12 (1) and what was said in those cases about total failure of consideration should be read as limited by this fact. If section 1 (1) does not require an absolute promise then section 12 (1) is the sole source of this element. Then if the condition is aptly excluded, whether by a simple exemption clause or by express reference to the element of chance in the fulfilment of the contract, it seems impossible to argue that the " whole object " still remains an unconditional transfer of property. If one cannot find an absolute promise to transfer

[14] Even if neither of the above arguments is accepted, it is submitted that property could still pass, if the parties intended it to do so, in the sort of case put by Cheshire and Fifoot. The mere fact that the contract would not be a contract of sale should not prevent this result. Other transactions which do not answer to the definition of a sale such as a contract for work and materials and a gift are effective to pass property.

[15] (1961) 77 L.Q.R. 98.

[16] *Ibid.*, at pp. 100–101.

[17] [1923] 2 K.B. 500 followed in *Butterworth* v. *Kingsway Motors* [1954] 1 W.L.R. 1286 and *Margolin* v. *Wright Pty. Ltd.* [1959] Argus L.R. 988. Mr. Guest argues that since s. 54 provides that nothing in the Act is to affect a purchaser's right to recover back money paid on a consideration which has failed this means that a mere exemption from s. 12 (1) is not effective to protect the seller. The contrary argument given above endeavours to show that s. 12 (1) is essential if actual transfer is to be the whole object and therefore if it is excluded, even by an exemption clause, and a bona fide possibility of obtaining title provided there is then no total failure and s. 54 causes no difficulty. Why cannot failure of consideration and breach of condition be so exactly coincident that exemption from one carries exemption from the other?

property either from the definition of sale or from the condition implied by section 12 (1) how can there be a failure of consideration if property is not transferred? [18] The situation would be on all fours with that before Patteson J. in the pre-Act case of *Chapman* v. *Speller* [19] where an implied term as to good right to sell was held to be excluded by the fact that the goods purchased had been sold at a sheriff's sale where a term as to title was generally held to be excluded. Patteson J. said:

> " The true consideration was the assignment of the right, whatever it was, that the defendant had acquired by his purchase at the sheriff's sale; and this consideration has not failed.
>
> " In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid."

The concluding words of the passage cited from the judgment of Patteson J. seem to underline the point that failure of consideration depends on the terms of the particular contract, from which it would follow that if there is no firm promise to give a good title because section 12 (1) has been excluded, whether by an exemption clause or by a direct reference to chance, then there is no failure of consideration.

Mr. Guest also expresses doubt as to whether a sale of *a chance* of a title can be a sale of goods. It has already been argued that such a contract could still be an agreement to transfer property, subject to a possibility, for a money consideration. It seems appropriate, however, to point out that it is plain from the opening words of section 12 that the legislature contemplated that contracts where section 12 (1) was excluded should still be contracts of sale. The words are:

> " In a contract of sale, unless the circumstances of the contract are such as to show a different intention. . . ."

It is submitted that it is clear that the opening phrase " in a contract of sale " refers to and covers not only contracts which include the three terms implied by the section but also contracts " where the circumstances of the contract are such as to show a different intention."

As editor of the most recent edition of *Anson on Contract* [20] Mr. Guest seems to adopt a somewhat different approach. He appears to rely on *Rowland* v. *Divall* as authority for the proposition that the term as to title is fundamental in character and hence not excludable. Against such a view the following points can be urged.

18 This argument assumes good faith on the part of the seller. There may well be failure of the " whole object " if the seller, having excluded s. 12 (1), fails to give a fair chance of title in that he knows that he has none to give.

19 (1850) 14 Q.B. 621.

20 21st ed., p. 127. See also Grunfeld (1961) 24 M.L.R., p. 71.

First, as has already been pointed out no question of an attempted exclusion of section 12 (1) arose in that case so that at the most it could only be authority of an indirect kind on this point. Secondly, a court of exactly the same composition as that in *Rowland* v. *Divall* (Scrutton, Bankes and Atkin L.JJ.) had two years earlier in *Niblett* v. *Confectioners Materials* [21] expressed the opinion that section 12 (1) could be excluded. Thirdly, even assuming that on common law principles the term as to title should be fundamental in character, the express provision in the opening words of section 12 for its possible exclusion seems to be sufficient to override the ordinary consequences of fundamental character. There seems no good reason why statute cannot be effective to rob the term of its principal distinguishing feature, non-excludability, but leave the transaction of which it forms, or would have formed, a part, legally effective in all other respects and entitled to a place in the same class of contracts, *i.e.*, sale, in which the transaction would have found a place if no exclusion clause had been included.

It is clear that there is a considerable body of pre-Act cases allowing the exclusion of a term as to title in sheriff and other forced sales.[22] After the Act there is the decision of Ridley J. in *Payne* v. *Elsden* [23] and dicta in *Niblett* v. *Confectioners Materials* [24] in support of the possibility of exclusion. Though this may seem to be scant authority, it contrasts favourably, it is submitted, with the complete absence of direct judicial support for those who would not permit exclusion.

Though English authority is thus exiguous, support for the possibility of excluding the term as to title may be derived from other jurisdictions with legislation similar or even identical in its terms with the Sale of Goods Act, 1893. Thus *Williston on Sales* [25] makes it clear that exclusion is permissible in the United States where the relevant sales legislation does not seem to differ materially from the Sale of Goods Act. Even stronger support comes from South Australia where the Sale of Goods Act, 1895, is identical in its terms with the English Act. The relevant case is *Warmings Used Cars* v. *Tucker*,[26] the essential facts of which in outline were that Tucker, a secondhand car dealer in a small way of business was offered a Holden car by one Temby. Tucker, being unable to purchase the car himself, went to see the manager of the plaintiffs, a firm of car-dealers in a more considerable way of business

[21] [1921] 3 K.B. 387. See (1957) 20 M.L.R. at p. 243.

[22] See (1957) 20 M.L.R. 238–239 for some references; Halsbury, *Laws of England*, 3rd ed., Vol. 34, p. 47 n. (r). A sheriff no longer requires the protection of these cases. He can now give a good title despite any defect in that of the judgment debtor: Bankruptcy and Deeds of Arrangement Act, 1913, s. 15 and *Curtis* v. *Maloney* [1951] 1 K.B. 736 and *Dyal Singh* v. *Kenyan Ins.* [1954] 1 All E.R. 847.

[23] (1900) 17 T.L.R. 161.

[24] [1921] 3 K.B. 387.

[25] Rev. ed., 1948 art, ss. 219–220 and 1959 supp., Vol. 1, p. 72.

[26] [1956] S.A.S.R. 249. The writer is grateful to Mr. D. S. Hogarth, Q.C., of Adelaide, for bringing this case to his notice.

than Tucker himself was. The manager, accompanied by Tucker, went to inspect the car in question and then certain transactions were concluded which Napier C.J. held to amount to a sale of the car by Temby to Tucker and a re-sale by Tucker to Warmings. It later transpired that the car had been stolen and Warmings, having paid off the claim of a customer who had bought the car from them, brought proceedings against Tucker for breach of section 12 (1). Napier C.J. held that the circumstances of the sale from Tucker to Warmings were such as to show that Tucker had no intention of guaranteeing a good title and hence rejected their claim for damages for breach of section 12 (1) and (2).

After remarking [27] that, strangely enough, this seemed to be the first case [28] in which a court had been called upon to consider what circumstances could be said to show an intention to exclude section 12 (1) he went on to say that he thought that assistance could be found in the pre-Act cases in the light of the draftsman's statement that it was intended to alter the form and not the substance of the law.[29] The learned Chief Justice then cites a long passage from the judgment of Erle C.J. in *Eichholz* v. *Bannister*,[30] in which passage reference is made to two other well-known pre-Act cases on this topic, *Morley* v. *Attenborough* [31] and *Chapman* v. *Speller*.[32] He then passes on to apply the principles to be derived from these authorities to the instant case before him saying:

> " Returning to the evidence in the present case, it seems to me that the circumstances, in which Tucker ' sold the black Holden ' to the plaintiff bear no resemblance to a sale in the ordinary course of things, as, for instance, where a purchaser goes into a shop and buys an article offered for sale, or goes to a farmer and says—' that is a nice beast, what will you take for it ? ' [33] or again where the seller brings a car to a dealer and asks him to put a price on it, whether in cash ' or on a trade in.' In any case like that it can be said that the ' seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale.' [34] But the common sense of the business is that in these cases the seller must be supposed to know what the buyer cannot be expected to know, and, where both parties are on an equal footing—having the same knowledge or the same means of knowledge—the fair inference may be that the subject of the contract was what the seller had to sell." [35]

27 At p. 254.
28 But see notes 23 and 24, *supra*.
29 This, of course, is not consistent with the rules for construing these commercial codifying statutes laid down by Lord Herschell in *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107 and Farwell L.J. in *Bristol Motors* v. *Fiat* [1910] 2 K.B. 831.
30 (1864) 17 C.B.(N.S.) 708 at 721.
31 (1849) 3 Ex. 500.
32 (1850) 14 Q.B. 621.
33 Reference to *R.* v. *Sampson* (1885) 52 L.T. 772.
34 17 C.B.(N.S.) at p. 723.
35 Reference here to *Hall* v. *Conder* (1857) 2 C.B.(N.S.) 22 at 42.

Napier C.J. after passing on to a further consideration of the facts before him then stated the following conclusion:

> " It seems to me that the case is not unlike those in which it has been held that the consideration for the price was the assignment of the right which had been purchased by the seller [36] . . . it seems to me that Tucker was not holding out to the plaintiff that he was the owner of the car. It would be unreasonable ' to impose on him all the perils of the transaction, or to emancipate the plaintiff from all the chances of failure.' " [37]

The case raises a further interesting point. Though Napier C.J. regarded Tucker as a seller he also regarded him as in some sense a quasi-agent of Warmings and his profit of £55 on the re-sale to Warmings as in the nature of a commission, the consideration for which was to be the passing of a good title to Warmings. This consideration having failed he held that Warmings could recover the £55. The Chief Justice said [38]:

> " . . . it seems to me that, in the peculiar circumstances of the case, the consideration should be regarded as severable being paid, partly, to free the car from the lien, and partly for the equity of redemption. [These terms are used in a metaphorical sense to describe the respective ' rights ' of Temby and Tucker]. On that footing, I think that there was a total failure of consideration so far as the £55 was concerned.
>
> " I think that the same result might, perhaps, be reached on the principle of *The Moorcock*. The transaction was carried through in the form of a sale, but, in effect, Tucker was bargaining for a commission for bringing the business to the plaintiff. The circumstances which lead to the inference of a term in the contract, excluding the warranty of title, would seem to justify the inference of a term excluding the right of the seller to recover his commission or profit on a transaction which turned out to be no more than the semblance of a sale."

Several points seem to arise here. Firstly, it seems clear from his earlier citations of *Morley* v. *Attenborough*, *Chapman* v. *Speller* and *Eichholz* v. *Bannister* that Napier C.J. regarded a sale where section 12 (1) was excluded as, in effect, the sale of a chance of title.[39] He in no way suggests, however, as Messrs. Cheshire and Fifoot appear to do, that such a sale of a chance of title would at the most be operative to pass possession and not property. There seems to be no suggestion in the above passages that if Temby had in fact a good title to the car, property would not have passed to Tucker and then to Warmings. Secondly, Napier C.J. does speak of the transaction before him as merely being " the semblance of a

[36] Reference here to *Chapman* v. *Speller* (1850) 14 Q.B. 621 and *Bagueley* v. *Hawley* (1867) L.R. 2 C.P. 625.

[37] Reference here to *The Moorcock* (1889) 14 P.D. 64 at p. 68.

[38] [1956] S.A.S.R. at p. 257.

[39] See note 13, *supra*.

sale." This, it is submitted, must be taken as a rather loose equivalent for some such phrase as " not a sale in the fullest possible sense." It can hardly be taken as support for the view of those who contend that an agreement excluding section 12 (1) necessarily involves conflict with section (1), for earlier in his judgment [40] he expressly held that the transaction before him was a sale and that that fact made it necessary to consider section 12 though on the other hand it must be admitted that in so holding he was concerned to determine that an element of barter in the transaction did not prevent it from being classed as sale and not to counter the contradiction argument. Finally, he speaks of " inferring an excluding clause " not of altering the whole nature of the contract into a sale of chance as something distinct from a sale of goods.

Admittedly *Warmings Used Cars* v. *Tucker* like the pre-Act English cases raised a question of an exclusion to be implied from the facts of the case but there seems no sound reason for any suggestion that what can be done by implication cannot equally be done by an express exemption clause drafted in suitable terms.

To sum it up, it is suggested that the following results seem to flow from the arguments and authorities here examined or advanced. Firstly, that it is possible to exclude section 12 (1) of the Sale of Goods Act in such a way that the resulting transaction may nevertheless be classed as a sale. Though it is admitted that where a seller first gives an absolute promise to give property and then insists that he is not transferring it, there would then be repugnancy between the two terms and the latter may be severed, it is nonetheless submitted that it would be perfectly possible to draft an exclusion clause which would not produce such a result. This would be the case where the seller only undertook to give such title as he might chance to have or where he merely declared that he refrained from guaranteeing that his title was good. Such a transaction might be classed as a sale and hence be governed in so far as was appropriate by the Sale of Goods Act on the basis of any one of three arguments. The first of these is that the reference to the transfer of property in section 1 (1) only indicated a possible result and not an essential characteristic of the contracts governed by the Act. The second argument is that contracts in which section 12 (1) was appropriately excluded could be regarded as contracts conditional upon the seller having title and hence saved as proper subject-matter for the Act by section 1 (2) and the third contention is that the opening words of section 12 can be regarded as constituting an exception to the generality of section 1 (1).

Another submission of a general character is that the opening words of section 12 are a clear bar to the term as to title being treated as fundamental in character even if pre-Act authorities did not seem to constitute powerful arguments against its possessing that character even at common law. Finally, it is suggested that

[40] [1956] S.A.S.R. at p. 254.

the sale of a chance of title is operative to pass property if the seller has in fact got the necessary property.

The writer must confess to a great deal of regret at being at variance with so many learned opinions to the contrary effect, the more so as he feels that some measure of restriction on present freedom to contract out of terms implied by the Sale of Goods Act may be desirable.[41] However, it is suggested that it is as well to know precisely the limits of present freedom. It would be most unfortunate if some future reformer happened to overlook the opening words of section 12 merely on the grounds that they could never really be operative and later a court felt bound to give effect to some oppressive exemption clause excluding title on the basis of the arguments here advanced in support of the contention that exclusion is at present generally possible.

A. H. Hudson.*

[41] For varying views on the best method of dealing with this problem see Unger (1957) B.L.R. at p. 38 who suggests legislation adapted to the needs of different trades, Ivamy (1956) C.L.P. at pp. 116–118 who suggests legislation for sale of goods similar to that in s. 8 of the Hire Purchase Act, 1938, and Atiyah, *Contract*, p. 232 who suggests the setting up of a "Standard-form Contracts" Court on the lines of the Restrictive Trade Practices Court.

* Lecturer in Common Law, University of Birmingham.

THE GREEK BOND CASES

With the decision of the House of Lords in *Adams* v. *National Bank of Greece and Athens S.A.*[1] the protracted litigation concerning the rights of English holders of sterling bonds issued by a Greek bank has come to an end. The case was a sequel to the decision of the House of Lords in *National Bank of Greece and Athens S.A.* v. *Metliss.*[2] Both cases concerned matters for which there was no previous authority and the contribution which they have made to the development of the conflict of laws can best be assessed by considering them in relation to one another.

I

In 1927 the National Mortgage Bank of Greece (hereinafter called " the mortgage bank ") issued sterling bearer bonds and the National Bank of Greece (hereinafter called " the old bank ") unconditionally guaranteed payment of the principal moneys and interest. Both banks were incorporated under Greek law. In 1949 the Greek Government declared a moratorium, the effect of which was to suspend all obligations on bonds payable in foreign currency. The moratorium was in force at all relevant times. In 1953 the Greek Government passed a law, Law No. 2292, which authorised the amalgamation or merger of banking companies and provided that any company which absorbed another company by merger, or any new company formed by amalgamation became the universal successor to the assets and liabilities of the old company. By a decree made under that law the old bank and another Greek company, the Bank of Athens (which, unlike the other banks, had assets in England) were amalgamated and a new company, the National Bank of Greece and Athens S.A. (hereinafter called " the new bank "), was formed. The decree provided that the old bank and the Bank of Athens should cease to exist and that the new bank should, without any further formality, become the universal successor to all rights and obligations of the amalgamated banks. In 1955, one of the bondholders, Mr. Metliss, commenced an action against the new bank claiming the interest that was in arrear on his bonds. Sellers J. (as he then was) found that the proper law of the bonds was English law [3] and that the new bank was liable to the plaintiff under the contract of guarantee. His judgment was affirmed by the Court of Appeal [4] and the House of Lords.[5]

1 [1961] A.C. 255. 2 [1958] A.C. 509.
3 [1956] C.L.Y. 1355. This was conceded by the new bank in all the subsequent litigation.
4 [1957] 2 Q.B. 33.
5 [1958] A.C. 509. Noted by Korah (1958) 21 M.L.R. 425; M. Mann (1958) 7 I.C.L.Q. 370; Carter (1958) 34 B.Y.B.I.L. 406.

Since discharge of a contractual debt is, in general, governed by the proper law of the contract, the finding that English law was the proper law of the bonds and thus also of the ancillary contract of guarantee debarred the new bank from pleading the moratorium. Instead, the new bank denied that it could be made liable on a contract governed by English law to which it was not the original party. This was a novel plea and, before it could be dismissed, the court had to give a positive answer to two separate questions:

(1) Would the English courts recognise the amalgamation of two or more companies under the law of the place of their incorporation and would they allow the new company to sue and be sued in England?

Both the Court of Appeal and the House of Lords gave an affirmative answer to this question and, in effect, no other answer seemed possible. It is well settled that the existence and dissolution of a foreign corporation depends on the law of the country of its incorporation [6] and it would be unreasonable not to regard amalgamation as falling into the same category.[7]

(2) Would the English courts, in the absence of the plea of novation or statutory assignment, compel the new company to assume the obligations and allow it to enjoy the rights arising under a contract governed by English law to which one of the amalgamated companies was the party?

This was a more difficult question as it involved the conflict between the respective provinces of the law governing the amalgamation and of the law governing the contract.[8] Greek law admittedly could extinguish a Greek company and create another Greek company in its place, but could it make such a new company liable on an English contract to which it was not the party? Once again all the judges in both the Court of Appeal and the House of Lords reached the affirmative conclusion, but they did not all reach it by the same route.

Denning [9] and Parker [10] L.JJ. (as they then were) in the Court of Appeal and Lord Keith of Avonholm [11] in the House of Lords

6 *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289.

7 There can be little doubt that a limited amalgamation under the law of the place of incorporation would be duly recognised in England but it would seem that no effect could be given to such an amalgamation by the English courts with respect to the performance of English contracts. See, however, the judgment of Lord Denning in the *Adams* case discussed above, p. 709.

8 The fact that English law was the *lex situs* of the bonds in addition to being the proper law of the contract of guarantee was treated as immaterial. Throughout the litigation the matter was regarded as a contractual one. See M. Mann (1957) 6 I.C.L.Q. 548. Furthermore, the present case is only an authority where a true *successio in universum jus* is concerned. Very different considerations apply to particular transfers and to the substitution by operation of the foreign law of one debtor for another in any given contract.

9 [1957] 2 Q.B. 33, 42–43.

10 *Ibid.*, pp. 51–53.

11 [1958] A.C. 509, 530–531. Since Lord Morton, *ibid.*, p. 527, expressly approved the reasoning of the Court of Appeal on this point it may be taken that he also favoured this approach. In the Court of Appeal Romer L.J. also partially adopted it, *infra*, note 21.

based their respective judgments on the analogy of the facts before them to the time-honoured concept of universal succession.[12] They held that the new bank was bound to meet the obligations of the old bank on the contract because by Greek law it stood in the position of the universal successor to the old bank, the original guarantor.[13] It is submitted that this is the most satisfactory approach to the problem. It is notable for the respect and attention it pays to the meaning and purpose of the concept of universal succession which is embodied in many foreign legal systems. Viscount Simonds was the only judge to refuse to rely on it altogether on the ground that, in his view, it was artificial.[14] It is, however, difficult to see why it should be more artificial than many other legal concepts; it can scarcely be so just because it happens to be unknown to English law. Furthermore, in the form of the amalgamation of companies it is part of English law.[15] It would seem, in effect, that the decision of the House of Lords was influenced by the fact that the amalgamation was carried out " by a process which is by no means alien to English legal conceptions." [16] Another advantage of this way of dealing with the problem is that it draws a clear demarcation line between the province of the law of the amalgamation and that of the law of the contract. In effect it seems to lead to the conclusion that nothing short of a universal succession by foreign law will be allowed to affect the discharge of liability on a contract governed by English law.[17]

Romer L.J. in the Court of Appeal and Lord Tucker in the House of Lords chose to deal with the problem in terms of the concept of status. To them universal succession to assets and liabilities appeared as an incident of the status of the new bank. It is settled law that the status of the company is governed by the

12 See *Beavan* v. *Lord Hastings* (1856) 2 K. & J. 724, *infra*, notes 37 and 62.

13 The analogy between the death of a natural person followed by universal succession to his estate and the dissolution of a corporation followed by amalgamation is striking but there are differences. The former is governed by the *lex domicilii* of the deceased at the time of his death, the latter probably by the personal laws of both the old and the new company. These will normally be the same, *Cf.* M. Mann, *supra*, note 5. *Contra*, Dicey, *Conflict of Laws*, 7th ed. (1958), p. 810. For another difference, see *infra*, p. 17. Carter, *supra*, note 5, argues that the analogy of universal succession might have " undesirable ramifications " if the question of the right of the bondholders to sue the original guarantor had arisen. But, with respect, it is difficult to follow this objection. If a corporation is dissolved by the law of the place of its incorporation it is no longer possible to sue it and obtain judgment against it in an English court and this is so whether the dissolution is followed by amalgamation with another corporation or not. The exceptional jurisdiction given by ss. 399 (5) (*a*) and 400 of the Companies Act, 1948, to the English courts to recall to life and to wind up in the interest of the English creditors a foreign company which has already been dissolved by the law of the place of its incorporation in no way affects the general position.

14 The learned Viscount did admit, however, that it made " the path seem more familiar and therefore easier " [1958] A.C. 509, 524.

15 s. 208 of the Companies Act, 1948.

16 *Per* Lord Tucker [1958] A.C. 509, 529. And see Viscount Simonds, *ibid.*, pp. 524–525.

17 See Lord Denning's judgment in the *Adams* case, *infra*, pp. 709–710.

law of the place of its incorporation and " we would surely look also to the country of the company's incorporation to discover what incidents had been attached by its laws to the body which it had created. Having ascertained what they are, effect would in general be given to them in our courts." [18]

This manner of solving the dispute suffers from some disadvantages. The concept of status and the distinction between status and its incidents, which have theoretical and practical attractions in cases involving domestic status, are of far less assistance in the field of company law.[19] Although the English courts cannot be said to have adopted a consistent attitude towards foreign status, it would seem that in cases of domestic status, the tendency has, by and large, been to attach to the foreign status such incidents as are given in English law to a corresponding status.[20] A corporation, however, is only what the foreign law determined that it should be. As the question must always be of the enforceability *vel non* in England of the very incident which the foreign law has created, the distinction between the status of the company and its incidents cannot easily or profitably be made. The question before the court in the present case was whether the new bank could be made to discharge obligations arising under a contract governed by English law to which it was not the original party. It is obvious that the court could not allow the law governing the amalgamation thus to affect liability on an English contract except in very special circumstances. Universal succession would seem to provide a legitimate occasion for this, but not so partial succession. Yet both can be regarded as incidents of the status of the company. It is submitted, however, that Romer L.J. and Lord Tucker regarded the fact of the universal succession as relevant to their decisions and that there is no warrant for extending them to cases of limited transfers of assets and liabilities.[21]

[18] *Per* Romer L.J. [1957] 2 Q.B. 33, 48. It is submitted that this proposition is much too widely stated.

[19] It would seem that the doubts cast by Viscount Simonds [1958] A.C. 509, 525 on the value of the concept of status must be restricted to the context in which they were expressed.

[20] This seems a better way of explaining the prevailing attitude of the courts than the proposition that the courts must recognise foreign status but need not give extraterritorial effect to all its consequences.

[21] It may be said that the universal transfer of the assets and liabilities is an incident of status so intimately connected with the creation and identity of the corporation as of necessity to be subject to the law of the place of its incorporation but that any transfer that falls short of this demands different considerations. Romer L.J. [1957] 2 Q.B. 33, 49 partially based his decision on the ground of universal succession. And see Lord Tucker [1958] A.C. 509, 529. His lordship also suggested another way of distinguishing between various incidents of the status of the company, *ibid.*: " In my view, the fact that this liability was attached to [the appellant company] at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile." But, with great respect, the mere fact that an incident has been attached at the birth of the company by its foreign creator cannot be in itself sufficient to affect discharge of liabilities or enjoyment of rights arising under an English

Viscount Simonds alone discarded both the concept of status [22] and that of universal succession [23] and preferred to base his decision on the principle of "rational justice." It has been argued that "rational justice" might require the same solution in the case of a partial transfer of assets and liabilities.[24] This may well be so, but Viscount Simonds' judgment is clearly limited to the facts before the court and offers no support for such an argument. On the other hand, it is submitted that resort to "rational justice" was unnecessary and that, as the other judgments show, it was possible for the court to reach a decision which was both just and founded on firm legal principles.

II

In the *Metliss* case the new bank was in all the courts held liable to discharge the guarantee obligations of the old bank. A doubt, however, remained as to whether or not this was due to the new bank having been substituted for the old bank as the actual party to the contract or merely directed to undertake its liabilities. The answer to this question became the main issue in *Adams* v. *National Bank of Greece and Athens S.A.*

On July 16, 1956, four days after the decision of Sellers J. in the *Metliss* case, the Greek Government passed a law, Law No. 3504, which amended Law No. 2292 of 1953 by providing that the new bank, as from the time of its creation, became the universal successor to the rights and liabilities of the amalgamated companies "except for the obligation to which such companies were liable whether as principal or guarantor . . . under bonds payable . . . in gold or foreign currency." It was established by expert evidence that the effect of this provision in Greek law was retrospectively to exclude from universal succession obligations which the new bank was held bound to discharge in the *Metliss* case.[25]

On dates subsequent to July 16, 1956, a number of bondholders presented their interest coupons to the mortgage bank for payment and, when this was refused, commenced their action against the new bank on the guarantee. Diplock J. (as he then was) held that the new bank was liable [26]; the Court of Appeal unanimously reversed his decision [27] and the House of Lords, also unanimously, restored the judgment of Diplock J.[28]

contract. The nature of the incident is of as great a significance as the time of its attachment. It may well be that this dictum provides some explanation for Lord Tucker's decision in the *Adams* case to rely on the doubtful authority of *Lynch* v. *Provisional Government of Paraguay* (1871) L.R. 2 P. & D. 268. See *infra*, p. 711

22 See *supra*, note 19.

23 See *supra*, p. 703.

24 By Carter, *supra*, note 5, who for this reason prefers Viscount Simonds' judgment.

25 It would not, however, disturb any judgment given before July 16, 1956.

26 [1958] 2 Q.B. 59. Noted by Korah (1958) 21 M.L.R. 429; M. Mann (1958) 7 I.C.L.Q. 613.

27 [1960] 1 Q.B. 64. Noted by Keenan (1959) 22 M.L.R. 556.

28 [1961] A.C. 255; [1960] 2 All E.R. 421. Noted by Lipstein (1960) 18 C.L.J. 169; M. Mann (1960) 9 I.C.L.Q. 695.

The decision essentially turned on the view held of the nature of the plaintiffs' right against the new bank. It was contended by the plaintiffs, and this contention was accepted by Diplock J. and the majority of their lordships,[29] that it was a contractual right, derived from English and not from Greek law. The effect of Law No. 2292 and of its recognition in the *Metliss* case was, in the opinion of these judges, once and for all, to substitute the new bank for the old bank as the party to the ancillary contract of guarantee.[30] The new bank and the bondholders thus stood as from 1953 in a contractual relationship (or in a relationship " indistinguishable from that which arises out of contract " [31]) governed by English law as the *lex causae* and independent of Greek law. In so far, therefore, as English law was prepared to recognise and give effect to the universal succession created by Law No. 2292 this became part of English law and, as part of that law, affected the English contract.

Once this position was reached the solution of the dispute presented no great difficulty. All that was left for the court to do was to characterise Law No. 3504. Diplock J. held that in the process of characterisation the court must pay more regard to the substance than to the form of foreign provisions and accordingly treated it as a law relating to the discharge of the contract rather than to the status of the company. The learned judge's insistence on looking at the substance of the matter and his refusal to be influenced by the form of Law No. 3504 and by its retrospective operation is much to be welcomed and provides a contrast to the uncritical acceptance of the foreign classification by the Court of Appeal in *Re Maldonado*.[32] On the other hand, in the circumstances no other solution seemed possible.[33] A debtor may be discharged directly by a law relieving him of his liabilities, or indirectly by a law altering the contents of his legal personality, which is what the Greek legislation purported to do. Finally, a debtor may be effectively discharged by a law extinguishing his personality. On the assumption that the effect of Law No. 2292 was permanently to place the new bank under contractual liability subject to English law, it was scarcely arguable that any later Greek law could be of any assistance

[29] Viscount Simonds, Lord Reid and Lord Radcliffe.

[30] Or, at any rate, as a person who could be sued on it and to whom all the incidents of the contract attached. See the judgment of Lord Reid [1961] A.C. 255, 280 where he pointed out that it was immaterial whether the new bank became strictly the party to the contract or was to be treated as if it were the party.

[31] *Per* Viscount Simonds, *ibid.*, p. 274.

[32] [1954] P. 223.

[33] Diplock J.'s reasoning is directly supported by that of Lord Reid [1961] A.C. 255, 282. The fact that the process of characterisation in the present case was so obvious may perhaps explain the express denial by Viscount Simonds that anything was to be gained from the attempt to apply to Law No. 3504 a label of precise description, *ibid.*, p. 274. Such a denial was also made by Lord Denning, *ibid.*, p. 288, but then in the approach to the case adopted by his lordship the problem of characterisation did not arise. See *infra*, p. 710.

to it, with the sole exception of a law merging it with some other corporation or dissolving it altogether.[34]

The reasoning of Diplock J. and of Viscount Simonds, Lord Reid and Lord Radcliffe appears, indeed, unexceptionable provided that the basic premise on which it is founded is accepted as sound. On this, however, there is room for doubt. The judgment of the Court of Appeal was that Law No. 2292 did not alter the terms of the contract of guarantee and that, accordingly, there was no contractual relationship [35] between Mr. Adams and the new bank. "The contracts remained unaffected by any Greek legislation. There was, however, a period when the law of Greece directed the appellant bank to undertake certain liabilities: while that period lasted bondholders found a substitute for their contractual debtor: but it was just as competent for the Greek sovereign power to terminate the period as it was for such power to originate it." [36] It is respectfully submitted that there is considerable strength in this argument. It was in substance accepted in the House of Lords by Lord Denning although, in the end, his lordship came to a different conclusion from that reached by the Court of Appeal with respect to the new bank's liability. The fact that the English courts are prepared to recognise and give effect to a foreign amalgamation accompanied by a universal succession by allowing a creditor in England to enforce against the universal successor liability arising under an English contract, to which such universal successor was not the original party, does not necessarily mean that the universal successor has in some way been made a party to the contract nor that the creditor is enforcing an English contractual right.[37] It can be said that on the facts before the court in the *Metliss* case, the English law as the proper law of the contract could only determine that the old bank was duly liable as guarantor. It was to Greek law that the English conflict rules referred the further question whether the liability of the old bank was or was not transferred to the new bank in such a way that the English court would give effect to the transfer with respect to liability arising under the contract governed by English law. Viewed in this way the liability of the new bank appears to be derived in the last analysis not solely from English law *qua* the proper law of the

[34] It is submitted that had Law No. 3504 extinguished the personality of the new bank no action against it would have lain in an English court, although, no doubt, the bondholders could have invoked the statutory jurisdiction given by ss. 399 (5) (*a*) and 400 of the Companies Act, 1948. And see *infra*, p. 713.

[35] In the House of Lords Viscount Simonds [1961] A.C. 255, 274 admitted that this was not a true contractual relationship but a kindred relationship for which he could find no name and, apparently, sufficiently close to a contractual relationship to be brought within the province of English law, as the proper law of the contract.

[36] [1960] 1 Q.B. 64, 86, *per curiam*.

[37] See *Beavan* v. *Lord Hastings* (1856) 2 K. & J. 724, *infra*, note 62, and Dicey, *op. cit.*, p. 587, illustration no. 4.

contract but also from Greek law *qua* the proper law of the amalgamation.[38] Viscount Simonds stigmatised as fallacious [39] the assumption, which in his opinion this argument involved, that the relation between the parties commenced when the cause of action accrued, *i.e.*, after July 16, 1956, and not when the original Law No. 2292 was enacted in 1953. But, with all respect, it is difficult to see wherein such fallacy lies. Neither the judgment of the Court of Appeal nor that of Lord Denning denied that the parties found themselves in some legal relationship the moment that the Greek Law No. 2292 was enacted. What both judgments did deny [40] was that this necessarily implied that the terms of the original contract of guarantee were in consequence irretrievably altered.

As Lord Denning pointed out, once a liability arose in the period between February 27, 1953, and July 16, 1956, no Greek law would be allowed to take it away.[41] The English courts would quite properly take an objection to any such law on the grounds of public policy and refuse to give effect to its retrospective operation. The combined effect of English law as declared in the *Metliss* case and of the Greek Law No. 2292 continued, however, only up to July 16, 1956, when Greek law was changed. The obligation of the old bank as guarantor was merely inchoate, *i.e.*, it would only effectively arise when the principal debtor made default. And since, on this reasoning, the new bank did not become party to the contract,[42] its own obligation was inescapably dependent on its being at that time the universal successor to the old bank. Liabilities arising after July 16, 1956, thus presented the court with an entirely different situation. Whilst the facts had materially changed the terms of the contract remained the same. To establish that the new bank was liable on the contract without having become a party to it, the bondholders still needed to rely on Greek law. "They must rely on the Greek law of amalgamation for the purpose: but they cannot rely on law 2292 as it was passed initially in 1953, because it was amended on July 16, 1956. They have to rely on

[38] The problem cannot, of course, be evaded by saying that the English courts treat foreign law as a fact and never enforce it directly. When law and fact are contrasted foreign law is obviously law although for the purpose of proof it may be treated as fact. The whole purpose of private international law is to ensure that in appropriate cases, subject to certain safeguards, the forum instead of applying its own substantive law will recognise and enforce rights conferred by the foreign *lex causae*.

[39] [1961] A.C. 255, 275.

[40] Expressly in the case of the judgment of the Court of Appeal; by necessary implication in the case of that of Lord Denning.

[41] [1961] A.C. 255, 288.

[42] It is submitted that the very basis of the judgment of the Court of Appeal is the court's finding that the contract in question was not altered in consequence of the recognition of the Greek Law No. 2292 by English law. Dr. M. Mann's criticism blaming the court for overlooking that in conflict cases "the selection of some rules of a foreign legal system as relevant at the same moment as others are dismissed as irrelevant is a familiar occurrence," *op. cit.*, p. 696, seems thus unjustified. Even less justified, with respect, is Dr. Lipstein's implication that the court's decision is founded on the characterisation of Law No. 3504 as relating to status.

Greek law 2292 in the amended form which it has assumed since July 16, 1956." [43]

Lord Reid, however, raised a further objection by arguing that the decision in the *Metliss* case that the moratorium did not apply, necessarily implied that the new bank became liable on the contract as the party to it and that, accordingly, Mr. Metliss had acquired an English contractual right against it.[44] Admittedly, the rights and obligations of the new bank as the universal successor were in Greek law subject to the moratorium and a Greek court would be bound to apply it. This point was not taken up by the other judges and, indeed, in the *Metliss* case Viscount Simonds placed a law imposing a moratorium in the same category as a law creating a period of limitation.[45] Again, in the same case in the Court of Appeal, Romer L.J. implied that he regarded such a law as procedural.[46] It would seem, however, that in principle, Lord Reid is right in treating the matter as a substantive one.[47] If Greek law had thus been the proper law of the bonds the English courts would probably have given effect to the moratorium.[48] But it does not necessarily follow that because the courts in any given case refuse to give effect to a foreign moratorium, the plaintiff must be taken to be enforcing an English contractual right independent of the foreign law. In the present case it seemed entirely legitimate for the court to apply Greek law as to the amalgamation and universal succession, and not to apply Greek law as to the moratorium.[49]

Once it is assumed that the new bank was not in consequence of Law No. 2292 liable to be sued on the contract as the party to that contract, the case for the defence appears very strong indeed. In effect, the plaintiffs could only meet it in one of two ways.

Lord Denning agreed with the Court of Appeal that the plaintiffs could only succeed by relying on the Greek law of amalgamation and that they had to rely on that law in the form which it assumed after July 16, 1956. " The bondholders must take the Greek law as it is, not as it used to be." [50] This being so the Court of Appeal held that the plaintiffs' claim must fail since the court felt unable to apply that part of Law No. 2292 (in the form which was retrospectively given to it) which made the new bank the universal successor of the old bank and not at the same time apply that part which excepted from the universal succession liability on bonds payable in gold or foreign currency.[51] Lord

[43] *Per* Lord Denning [1961] A.C. 255, 288.
[44] [1961] A.C. 255, 279–280.
[45] [1958] A.C. 509, 526.
[46] [1957] 2 Q.B. 33, 51.
[47] *Cf.* Dicey, *op. cit.*, pp. 807–808.
[48] See *Re Helbert Wagg & Co. Ltd.'s Claim* [1956] Ch. 323.
[49] Neither Lord Denning nor the members of the Court of Appeal felt any difficulty on this score.
[50] [1961] A.C. 255, 288.
[51] The court also rejected the somewhat uninspired argument that the Greek law in its new form should be disregarded as being of a confiscatory or discriminatory character. The new law, in effect, applied to every bank which was, or was to be in the future, amalgamated under Law No. 2292 and to every bond issued by such banks in foreign currency.

Denning, however, thought that the English courts might in certain circumstances accept a foreign amalgamation subject to the condition that, if the new amalgamated company took possession of the assets, it must be responsible for the liabilities.[52] Applying these principles to the facts before the court, his lordship held that the amalgamation sought to be established retrospectively by Law No. 3504 amending Law No. 2292 was inconsistent with the essence of the concept of amalgamation and there was " no comity of nations " [53] which required the English courts to recognise it. This reasoning is, with respect, in full harmony with the *ratio* of the *Metliss* case that, in the absence of novation or statutory assignment, only a true universal successor can be made to assume liabilities arising under an English contract to which it was not the original party. Lord Denning's final conclusion, however, that the court was entitled to accept the amalgamation as effective to create a *successio in universum jus* and to reject the attempt to detract from it, is not entirely free from difficulties. On the authority of the *Metliss* case, the plaintiffs needed to find in Greek law a universal successor. Admittedly, as Lord Denning pointed out,[54] all the assets had become irretrievably vested in the new bank; but was this sufficient to produce a *successio in universum jus*? The negative answer given by the Court of Appeal cannot be easily assailed on logical grounds. Its validity is best tested by asking what the position would have been had Law No. 2292 originally contained the provision which was retrospectively inserted in it by Law No. 3504. Neither Diplock J.[55] nor Lord Reid were prepared to give a concluded opinion on this " different and perhaps difficult question." [56] On the view both judges formed of the nature of the new bank's obligations no such opinion was, of course, necessary. Although Lord Denning did not specifically consider this problem, it is submitted that his lordship would be prepared to uphold the new bank's liability even in such an event. This is the only conclusion which seems consistent with his emphasis that liabilities arising after July 16, 1956, must be treated differently from those arising previously and with the natural meaning of the terms of his judgment. Relying on Lord Atkin's judgment in *Russian and English Bank* v. *Baring Brothers*,[57] Lord Denning reached the conclusion that " English law may refuse to accept the amalgamation and wind up the former companies as though they had not been destroyed: or it may accept the amalgamation subject to the condition that, if the new amalgamated company takes possession of the assets, it must be responsible for the liabilities: for that is of the

52 [1961] A.C. 255, 289.
53 *Ibid.*
54 *Ibid.*
55 [1958] 2 Q.B. 59, 74.
56 [1961] A.C. 255, 283.
57 [1936] A.C. 405, 428.

very essence of the process of amalgamation." [58] These words form the core of his lordship's judgment and there is no suggestion in them that his decision would have been any different had Law No. 2292 been originally enacted in the form to which it was subsequently amended.

It may well be that as a matter of logic the Court of Appeal was right in refusing to hold the new bank liable but it must be admitted that the decision of the House of Lords was in the circumstances both just and convenient.[59] This decision could be reached either by the line of reasoning followed by Viscount Simonds, Lord Reid and Lord Radcliffe or by that adopted by Lord Denning. Either has its advantages, not the least merit of the majority view being its comparative simplicity. To the present writer, however, the approach of Lord Denning is, for a variety of reasons, more attractive. To begin with, it is not dependent on the somewhat artificial premise that the Greek amalgamation legislation in effect modified the terms of an English contract. Furthermore, this approach alone appears to provide for the liability of the new bank even in the hypothetical case of Law No. 2292 being originally enacted in the form which it subsequently assumed. Lastly, and this becomes particularly clear when Lord Denning's judgments in the *Metliss* and the *Adams* cases are read together, the competing claims of the English and foreign law are therein adjusted in a manner which shows more respect for and better understanding of such foreign law and its aims.[60]

The other way in which the plaintiffs could challenge the case put for the new bank was by asserting that the amendment of Law No. 2292 by Law No. 3504 must be disregarded on the ground that the English courts do not recognise retrospective alterations to the succession involved in an amalgamation, once the validity and consequences of the succession have been established by the competent foreign law. Some support for this proposition and the somewhat cavalier treatment of foreign law which it sanctions could be found in the decision of Lord Penzance in *Lynch* v. *Provisional Government of Paraguay*.[61] In the House of Lords only Lord Tucker chose to base his decision entirely on this ground [62] but

58 [1961] A.C. 255, 289. See, however, M. Mann, *op. cit.*, p. 700, for a different interpretation of Lord Denning's judgment.

59 The obvious difficulties felt by some of their lordships in the present case in reaching a decision which would both be just and convenient were obviously a legacy of some of the judgments in the *Metliss* case.

60 It could be argued that Lord Denning's judgment merely adds a gloss to the *ratio* of the *Metliss* case: a foreign amalgamation will be allowed to affect liability on an English contract if it is accompanied by the transfer of a substantial proportion of assets and liabilities from the amalgamated companies to the new company. Such an interpretation, however, belies his lordship's insistence in his judgments in both cases on the necessity for the foreign amalgamation to create a *successio in universum jus*.

61 (1871) L.R. 2 P. & D. 268.

62 By deciding to ignore Law No. 3504 altogether, Lord Tucker avoided the necessity of determining the nature of the bondholders' rights against the new bank.

Viscount Simonds and Lord Radcliffe adopted it in part. It is submitted that resort to the doctrine of the *Lynch* case was erroneous and unfortunate, and in the case of Viscount Simonds and Lord Radcliffe also unnecessary, and that Lord Reid's specific refusal to rely on that case is to be welcomed. It must, however, be emphasised that, although Lord Tucker, Viscount Simonds and Lord Radcliffe did not share Lord Reid's views on the propriety and wisdom of using the analogy of the *Lynch* case in the facts before them, they must not be taken to have intended to lay down any general rule that the English courts will never give effect to foreign retrospective legislation.[63]

The determination of the *ratio* of the *Lynch* case has been the subject of much controversy.[64] According to one view the case decided that, as far as movables are concerned, the English courts only recognise the laws of succession in force in the country of the deceased's domicile at the date of his death; according to another view its *ratio* is restricted to the purely formal question of the grant of probate or administration.[65] In the present case Diplock J. added another interpretation: "a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognise as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased."[66] There is very little support to be found in Lord Penzance's judgment for this view which, however, usefully reaffirms that the *lex domicilii* in testamentary matters operates only by the grace of the *lex situs*. Whatever may be the true explanation of the *Lynch* case, it seems impossible not to take into account the very unusual facts before the court in that case and the obviously penal character of the foreign retrospective legislation involved.

It is submitted that the authority of the *Lynch* case should be confined within the limits of the facts with which it dealt and, further, that no justification can be found for resorting to it by

[63] This wide proposition, for which it is sometimes asserted that the *Lynch* case is an authority (see an article by the present writer in (1959) 35 B.Y.I.L. 58), is contrary to a number of decisions of the House of Lords: *R.* v. *International Trustee for the Protection of Bondholders A.G.* [1934] A.C. 500; *Kahler* v. *Midland Bank* [1950] A.C. 24; *Starkowski* v. *Att.-Gen.* [1954] A.C. 155. In the present case Lord Reid expressly denied the existence of such a general rule [1961] A.C. 255, 283. See also M. Mann, *op. cit.*, pp. 698–699.

[64] See an article by F. A. Mann in (1954) 31 B.Y.I.L. 217 and the article by the present writer cited *supra*, note 63.

[65] The former view seems in effect to have been adopted by Lord Tucker, Lord Radcliffe and Viscount Simonds. Yet Lord Penzance expressly refused to pay attention to the fact that the foreign decree in question was of a penal character and explained this refusal on the ground that the jurisdiction of his court was purely formal. With respect, Lord Penzance did not, and, in the circumstances, could not have "held that the right to the grant of probate and *the succession to the property* must be governed by the law of Paraguay as it existed at the time of the death": *per* Viscount Simonds [1961] A.C. 255, 275 (italics supplied).

[66] [1958] 2 Q.B. 59, 76.

way of analogy in the present case. The question before the court involved neither a grant of probate nor succession to movable property in England but transfer of liability arising under a contract governed by English law.[67] The relevant foreign legislation was not of a penal or even a discriminatory character. Moreover, the analogy between the death of a natural person and the extinction of a corporation followed by amalgamation is not exact and, in particular, would have clearly failed had the subsequent Greek law extinguished the new bank altogether and transferred its assets and liabilities to another corporation. It would seem that the English courts would have given effect to such a law and thus admitted that the new bank had ceased to be the universal successor to the old bank.[68]

There is another reason for regarding the authority of the *Lynch* case, even within its strict sphere of application, with suspicion. In that case a change occurred in the substantive law of the foreign legal system selected by the conflict rule of the forum. As a matter of principle such conflicts of laws in time should be solved by reference to the transitional rules of the foreign law in question.[69] Lord Penzance did not follow this principle, but it was adopted by the House of Lords in every case in which it was faced with this problem.[70] That this is the true rule of English law has further been strikingly shown by the judgment of the Court of Appeal and that of Lord Denning in the present case. It is submitted that, on the premise adopted by Viscount Simonds and Lord Radcliffe as the basis of their decision, no conflict of laws in time arose [71] and resort to the *Lynch* case was, with respect, unnecessary and inconsistent. As in their lordships' opinion the effect in English law of Law No. 2292 was to make the new bank a party to the contract of guarantee of which the proper law was English law, a later

67 In *Beavan* v. *Lord Hastings* (1856) 2 K. & J. 724, *supra*, notes 13, 37, Page Wood V.-C. was of the opinion that a plaintiff in England could have sued the defendant, who was a universal successor to his brother by the law of France, where his brother died domiciled and where all his property was situate, for a debt which the brother had incurred to the plaintiff. It is submitted that, on these facts, had the defendant been subsequently disinherited by a retrospective French law and deprived of the property there, the English courts, the *Lynch* case notwithstanding, would have given effect to such law and dismissed the plaintiff's claim. Justice, convenience and common sense would seem to dictate this solution. See Lord Reid [1961] A.C. 255, 281, and Dicey, *op. cit.*, p. 587.

68 See Lord Reid, *ibid.*

69 See the articles by F. A. Mann and the present writer cited *supra*, notes 63 and 64. For a different view of the law see Spiro (1960) 9 I.C.L.Q. 357. See also Lipstein, *op. cit.*

70 *R.* v. *International Trustee for the Protection of Bondholders A.G.* [1934] A.C. 500; *Starkowski* v. *Att.-Gen.* [1954] A.C. 155. It is also submitted that in *New Brunswick Ry.* v. *British and French Trust Corporation* [1939] A.C. 1 the House of Lords left the decision whether a foreign enactment was retrospective to the foreign law in question. There does not appear any good reason why, subject always to the policy of the forum, the problem of conflict of laws in time should not be solved in like manner whatever the subject-matter of the dispute may be.

71 This seems to have been overlooked by Dr. Lipstein, *op. cit.*

Greek enactment which did not dissolve the new bank altogether, could not affect its obligations on the contract, not because such enactment was *post mortem defuncti* but because it was Greek.

J. K. GRODECKI.*

* Lecturer in Law in the University of Bristol.

WHO CAN PLEAD THAT A CONTRACT IS *ULTRA VIRES*?

At first sight the significance of the decision in *Anglo Overseas Agencies, Ltd.* v. *Green* [1] lies in the applicability of the decision in *Cotman* v. *Brougham*.[2] The plaintiff company's memorandum of association contained in paragraph (E) of the objects clause a wide residuary provision. A contract between the plaintiff company and the defendants fell within the widest meaning of this provision but the defendants contended that the contract was *ultra vires* the company on the ground that paragraph (E) should read as only ancillary to the " main objects " as set out in paragraphs (A) and (B). The draftsman of the memorandum must have foreseen such an argument, for the concluding words of the objects clause were " the objects specified in any paragraph of this clause shall, except where otherwise specified in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company." Salmon J. held, following *Cotman* v. *Brougham*, that this provision was apt to exclude the main objects rule and therefore that the contract was *intra vires*.

This decision seems inevitable but it is surprising that the important question of whether the defendant could set up the defence that the contract was *ultra vires* the plaintiff company was allowed to go by default. Counsel for the plaintiff company does not seem to have argued the point and Salmon J. simply said " whatever the merits may be, if the ' main objects ' rule does in law apply in this case then the piece of business in respect of which the plaintiff company purported to engage the defendants was *ultra vires* the company, and the defendants would in law clearly be entitled to succeed in the action." [3]

It is doubtful however whether the matter is really self-evident. The books, where they are not completely silent, speak with a divided voice on this subject. Dr. Pennington says that an *ultra vires* contract cannot be enforced by the company.[4] Professor Gower is less dogmatic. He says [5]: " It is not clear whether the other party when sued by a company can plead as a defence that the contract was *ultra vires*. On normal principles of the law of contract he should not be able to set up the incapacity of the

1 [1961] 1 Q.B. 1; [1960] 3 All E.R. 244.
2 [1918] A.C. 514.
3 [1961] 1 Q.B. at 8; [1960] 3 All E.R. at 245. Professor Goodhart in his comment at 77 L.Q.R. 11 does not discuss this point. *Cf.* Treitel 77 L.Q.R. 83 at 86, note 20.
4 *Principles of Company Law*, 1st ed., p. 70. The only authority cited is *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653.
5 *Modern Company Law*, 2nd ed., pp. 90–91.

person with whom he has contracted, but whether this applies in cases of *ultra vires* is obscure." Street however is clear that the defence cannot be raised against the company. "The doctrine having been enunciated as a weapon of defence for the protection of corporations, no other party can take the plea as a defence against it." [6]

Clear authority on the point is hard to find. Professor Gower refers to *Smith* v. *London Transport Executive* [7] but the decision in that case is some way removed from the present problem. The plaintiff sought an injunction, declaration and damages on the ground that the Executive were operating a bus service in an area where they were not empowered to do so. The House of Lords held that the service was within the powers of the Executive but it was assumed without argument that the plaintiff would be entitled to relief if the Executive had exceeded its powers. It can be argued that if the plaintiff could set up *ultra vires* in this case, then a person who enters into a contract with a corporation can equally set up *ultra vires*. But the case is at most *sub silentio* authority and it is not clear that it is even that, for no question of contract was involved and the problem was really one of judicial review of administrative action. Possibly there is an even shorter distinction in that *ultra vires* is not really the same concept in company law and administrative law. But this is a controversial point which requires fuller discussion than is here appropriate.

The fullest treatment of the subject is that of Street but though his conclusion (that only the company can plead *ultra vires*) is dogmatic, none of the authorities he relies on seems to be directly in point. In *Bournemouth Commissioners* v. *Watts* [8] and *Brooks Jenkins and Co.* v. *Torquay Corporation* [9] the contract was not *ultra vires* but merely bad for lack of the corporate seal and the attack was being made not by the other contracting party but collaterally. *National Telephone Co. Ltd.* v. *The Constables of St. Peter Port* [10] was not a case of contract at all but a decision of the Judicial Committee that where the plaintiffs had put up telephone wires without statutory authority the defendants were not entitled to take the wires down merely because the erection was *ultra vires* the plaintiffs.[11] Similarly in *Re Oxted Motor Co. Ltd.*[12] the act unsuccessfully impugned was not a contract but a resolution to wind up voluntarily which was formally irregular but had been approved by all the shareholders.

Somewhat more to the point are *Re Coltman* [13] and *Garrard* v.

[6] *Ultra Vires*, p. 30.
[7] [1951] A.C. 555.
[8] (1884) 14 Q.B.D. 87.
[9] [1902] 1 K.B. 601 at 608.
[10] [1900] A.C. 317.
[11] [1900] A.C. at 321. The defendants succeeded however by virtue of a power vested in their office.
[12] [1921] 3 K.B. 32.
[13] (1881) 19 Ch.D. 64.

James.[14] In the former case the members of a friendly society had lent £300 to A on the security of a joint and several promissory note by A, B and C. C having died, the trustees sought to prove against his estate and the defence was set up that a loan on personal security was illegal by virtue of the Friendly Societies Act.[15] The Court of Appeal, reversing Fry J., rejected this defence but apparently because they did not regard the transaction as *ultra vires*. Jessel M.R. said that there was nothing in the Act to prevent all the members effectually authorising the loan.[16] In *Garrard* v. *James* the plaintiff agreed to lend £1,500 to a company by buying 1,500 £1 preference shares, the company agreeing to repurchase the shares at par on notice by the plaintiff or his son-in-law, who was to become business manager of the company. The defendants, who were directors and shareholders of the company, joined as sureties guaranteeing the performance by the company. When the plaintiff gave notice, the company refused to perform and the plaintiff sued the defendants on their guarantee. They sought to set up the defence that the contract with the company was *ultra vires* and illegal since the company could not purchase its own shares.[17] Lawrence J. held that even though the contract could not be enforced against the company, the guarantee could be enforced against the defendants. This is scarcely a decisive authority for the view that the contract could have been enforced against the plaintiffs by the company, for it is clear that Lawrence J. regarded the defendant's guarantee as imposing an obligation to see that the money in fact advanced to the company was restored to the plaintiff, whether the company's failure to repay was due to physical or legal inability.[18]

It is submitted therefore that there is no authority deciding whether a contracting party can set up *ultra vires* against a company other than the decision in *Anglo Overseas Agencies Ltd.* v. *Green* itself. It may be opportune therefore to consider what answer is dictated by principle. Professor Gower suggests that normal principles of contract law would point against the other contracting party being able to set up *ultra vires*. This point is not developed but it would seem that he has in mind a case such as infancy, where the infant's incapacity is said to be a personal privilege and cannot be relied upon by the other party.

A number of answers may be made to this argument. In the first place the rules relating to the contractual capacity of infants

14 [1925] 1 Ch. 616.

15 38 & 39 Vict. c. 60.

16 (1881) 19 Ch.D. 64 at 69.

17 It is not, of course, strictly accurate to regard a company's inability to buy its own shares as an example of *ultra vires*. See Gower, *Modern Company Law*, 2nd ed., pp. 82, 105.

18 [1925] 1 Ch. at 622. The law relating to guarantees of void contracts is still unclear. See *Yeoman Credit, Ltd.* v. *Latter* [1961] 1 W.L.R. 828; [1961] 2 All E.R. 294, discussed at 24 M.L.R. 644.

are themselves fraught with possibilities for injustice and may be thought to provide an insecure basis for argument by analogy. Nor is it easy to appreciate the logical basis of the personal privilege argument. If the infant's promise is not binding upon him it is difficult to see what consideration he gives for the other party's promise.[19] It may be that despite the logical difficulties and periodic injustices which they cause, the rules as to infants can be justified by an overriding need to protect infants but it is fanciful to seek to justify the creation of similar problems in the case of companies by a need to protect companies. Experience has surely shown that it is persons who contract with companies who need protection and to hold that a company can enter into *ultra vires* transactions knowing that it can disown them if they turn out unfavourable and enforce them if they prosper is, in the words of Fletcher Moulton L.J., " to put a huge premium upon a company acting *ultra vires*, for it would enable it to acquire assets for the benefit of its members without the obligation or even the power to give consideration for them." [20] It is submitted therefore that since the effect of the *ultra vires* doctrine is to render the contract void and not merely voidable or unenforceable, and since this is insisted on to the extent that neither judgment by consent [21] nor ratification by all the shareholders [22] can render it valid, it should follow that neither party is able to enforce the contract.[23]

This conclusion seems to be supported by the balance of the American authority. Apparently most American jurisdictions have departed some way from the full logic of the *ultra vires* doctrine, as exemplified in this country. In many states there has been legislation which has emasculated the doctrine.[24] For the most part this has followed the American Law Institute's Model Business Corporation Act, section 6 of which provides that a corporate act shall not be invalid because it exceeds the powers of the corporation but that such lack of capacity may be relied on by a shareholder in a suit to enjoin the act, by the corporation in an action against the directors responsible for the act or by the Attorney-General in a

19 The end result is what Mr. Honoré calls a " unilaterally void " contract. 75 S.A.L.J. 32. Such a concept is no doubt possible but whether it is consistent with the framework of the English law of contract is another matter.

20 *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch. 183 at 222.

21 In order for the judgment to be effective the court must have specifically adjudicated on the *ultra vires* issue: see Gower, *Modern Company Law*, 2nd ed., p. 88.

22 It is controversial whether a subsequent alteration of the memorandum can operate as a ratification. *Cf.* Holt 66 L.Q.R. 493 and Gower 67 L.Q.R. 41.

23 Another way, albeit somewhat metaphysical, of arriving at this result would be to argue that when the company's directors and servants act outside the ambit of the company's powers, their acts are not the company's so that the contract is not merely void but non-existent.

24 See 2 *Williston on Contracts*, 3rd ed., pp. 166, 167, especially notes 18, 20. See also the minutes of Evidence of the Company Law Committee, Fourteenth Day (Friday, February 10, 1961) at pp. 999–1001, 1052 and 1065.

suit to dissolve the corporation or enjoin it from transacting unauthorised business.[25] Even where there has been no legislation the common law position is much less rigid than in England. In particular, once the contract has been completely performed, " the law lets it alone and any property rights acquired by either party thereunder will be protected," [26] and most jurisdictions will give some relief either in contract or in quasi-contract where the contract has been partly performed. However, in the absence of legislation, a wholly executory *ultra vires* contract will not be enforced and this is so whether it is the company or the other party which is seeking to enforce the contract.[27] There is a clear statement to this effect by Gray J. in *Central Transportation Company* v. *Pullman's Palace Car Company* [28]:

> " A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organisation, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. *The contract cannot be ratified by either party, because it could not have been authorised by either . . . when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.*" [29]

In this case the defendant corporation argued that the contract, which was in effect a lease for ninety-nine years of all the assets and business of the plaintiff corporation to the defendant corporation, was *ultra vires* both corporations. This presented the point here discussed in a particularly neat form, for if it were true that only the corporation which has contracted *ultra vires* could take advantage of the contract being *ultra vires*, then the only question would have been whether the contract was *ultra vires* the defendant corporation. But in fact Gray J., delivering the opinion of the Supreme Court, concentrated his attention on whether the contract was *ultra vires* the plaintiff corporation. After deciding that it was, he held that it was " unnecessary to determine whether it is also *ultra vires* of the defendant, *because, in order to bind either party,*

25 This of course approximates to the recommendation of the Cohen Committee [Cmd. 6659, para. 12] " that every company, whether incorporated before or after the passing of a new Companies Act, should notwithstanding anything omitted from its memorandum of association, have as regards third parties the same powers as an individual."

26 2 *Williston on Contracts*, 3rd ed., § 271, p. 163.

27 See Warren, 24 Harvard L.R. 534 at 542, 545; Harno, 35 Yale L.J. 13 at 23; Stevens, 36 Yale L.J. 297 at 306. Aliter *Harris* v. *Independence Gas Co.* 76 Kan. 750 (1907) holding that neither party can set up *ultra vires* (a report of this case is not available to the writer).

28 139 U.S. 24 at 59; 35 L.Ed. 55 at 68 (1890).

29 Italics supplied.

it must be within the corporate powers of both." [30] A similar view was expressed by Atwell D.J. in *Hal Brown Ltd., Inc.* v. *Dillard et al.*[31] though here the contract was held not to be *ultra vires*. State courts appear to take the same view.[32] It is submitted therefore that both principle and authority point unequivocally to the conclusion that either party to a contract may set up the defence that the contract is *ultra vires*.

M. P. Furmston.*

[30] 139 U.S. at 54; 35 L.Ed. at 66. Italics supplied.
[31] 15 F. 2d 408 (1926).
[32] Warren, *op. cit.*, cites *Copper Miners* v. *Fox*, 15 Jur. 703; *Nassau Bank* v. *Jones*, 95 N.Y. 115; *Bank of Chillicothe* v. *Swayne*, 8 Ohio 257; *Marble Co.* v. *Harvey*, 92 Tenn 116, but reports of these cases are not available to the writer.

* Lecturer in English Law, University of Birmingham.

THE JUDICIAL PROCESS AND THE ASCERTAINMENT OF FACT*

THE psychiatrist is a not infrequent visitor in courts of criminal justice, and of course observes the scene from his own particular point of view. As a witness, he is naturally under close examination by judge and counsel; and these gentlemen come to conclusions about psychiatric habits of mind which are frequently expressed with great robustness, both in and out of court. In the same way the psychiatrist, whose professional habit it is to inquire into the ways of behaviour and the motives of his fellow-men, watches the performance put up by those with whom he is engaged, and forms conclusions of his own. The opportunity of expressing them, however, comes all too rarely; and this is why I am grateful to be given such a chance today.

The judicial process does not seem to be designed primarily for the ascertainment of fact; and if it is not so designed, it is hardly surprising that it is not very successful. It is true that an effort is made to elicit facts of a certain kind; but these are facts in a legal and not in a scientific or even in a popular sense. A Lord Chief Justice once told a company of which I was a member, that facts were what was found by a jury. For instance, if a jury found that the accused was not insane, then it was a fact that he was not insane, no matter what any number of medical men might say. Fact of this kind is of an altogether lower order than scientific (or verifiable) fact. But lawyers have had to put up with Brummagem goods for so long, that I do not think they always recognise the better article when they are given it.

However, ascertainment of fact, even in this limited sense, is not the primary purpose of the judicial process. This purpose is, I believe, something quite different, namely, to display the might and majesty of the law. Why else do we observe, with an astonishment only mitigated by ennui, the elaborate ritual, the Oyez, the calling on the Almighty, the may-it-please-your-lordships, the fancy dress, the hordes of police kept waiting in attendance? These measures were designed centuries ago to amaze the peasantry and to strike fear even into the arrogant feudal baron. They were, perhaps, appropriate to an age of simplicity, when respect would only be given when claimed by pomp and show. Surely this time is past.

* This subject was discussed at a meeting of lawyers and sociologists held at the Institute of Advanced Legal Studies. Certain short papers, including this, were read at the opening of the discussion. It was felt by the lawyers present that the impressions of a psychologist would be of general interest to the profession and accordingly Dr. Slater was asked to permit publication in this Review.—Ed.

The judge earns respect by the fairness and the ability with which he does his task, and these are not increased by the wearing of a wig. A wig, in fact, by the effort it discloses to evoke respect by the trickery of simple suggestion, in the mind of the thoughtful man excites only derision.

Pomp and spectacle do of course play a part in the graces of life. There is no section of the community which does not make use of ceremony, on ceremonial occasions. But most professions put aside the frippery, the chains, the hoods, the wands of office, when they get down to daily tasks; and the way the legal profession clings to this sort of nonsense is anachronistic. It has a number of bad effects. By overawing the simple and inexperienced witness, it saps his confidence and increases his tendency to confusion. It has been found impossible to conduct children's courts in this way. The other victim is the judge himself, who is seldom able to resist the suggestion, daily reinforced over the years, that he in his proper person is something above the common run of humanity.

There is a motivation, even more basic, which has its ill effects on the ascertainment of fact. To the ordinary citizen, the primary aim of administering the criminal law is to protect the public against wrongdoing. This is, of course, not a lawyer's idea; but I think the lawyers should explain this to the public in words of one or two syllables. Punishment of wrongdoing, restricted to the doing of illegal acts, has, so it is held, a retributive and a deterrent aspect. For these purposes it has to be awarded in due form, conspicuously, so that justice may be seen to be done. Any failure to maintain the due form negates the whole process. Higher courts do not hesitate to quash a sentence, and let loose a known enemy of society, if there has been even a minor lapse in the formalities. Punishments tend to be so severe, at the upper end running into deprivation of life and imprisonment for forty years, that the officers of the law, as humane men, become reluctant to inflict them, without requiring unrealistic standards of proof. We are constantly being reminded that the police know very well who is the author of such and such a crime, but that they are unable to take action because their knowledge is based on facts, cogent enough for moral certainty, but lacking possibility of proof by legal standards. Now it is one of the best established tenets of criminology that people are stopped from prohibited actions by the degree of certainty and not by the degree of severity of punishment. What the public needs from the legal profession is not more emphasis in stigmatising the evildoer who has been caught out, but the arrest of a higher proportion of the badly behaved from their antisocial courses.

Mr. Du Cann, in his book *Miscarriages of Justice*, criticises British justice on a number of counts. The procedure of a criminal trial is not inquisitorial but accusatory. It is loaded with a hide-bound traditionalism and theatricalism. Get rid, he says, of the useless formulae; get rid of the dock; provide desks and writing

facilities for the accused, the jurymen and others. Use all up-to-date business methods. Get rid of the oaths and substitute affirmations. Perjury is rife: bring the perjurors to book. The single judge system is at fault: judges are too often deaf, ill or senile. Oral advocacy by professional pleaders can, and often does, deflect the straight course of justice. The laws themselves are chaotic, obsolete statutes cluttered by case-law. Substitute a criminal code.

Of these many points I should like to emphasise but two. However much they are persuaded of the opposite, judges are made of the common stuff of humanity. If a man's powers begin to fail, it is not possible for him to have full insight into the change. The man whose memory is getting weaker, whose judgment is impaired, whose sympathies are withering, seldom realises what is happening, and always thinks much better of his powers than does the outside observer. One may be glad that it has at last been recognised that judges, like professors and doctors, suffer from our common lot, and that a retiring age has been fixed. But when one considers the fatefulness of the decisions that lie in a judge's hands, it would seem well to have available for them the same possibilities of medical supervision, and if necessary compulsory retirement on medical grounds, as exist elsewhere in the civil services. A further point emerges. The aphorism that power corrupts is as true of judges as of other men. Long exercise of the magisterial function has a deleterious effect on the personality. The danger would be less if the duties of convicting and of passing sentence were in different hands. Certainly the considerations which should be borne in mind on the two occasions are of a very different kind. Information of a kind not available to judges, for instance about the effect of punishments on criminals of different kinds and the ways in which their subsequent careers are affected by them, should be constantly brought up to date and be made available to the sentencing authority.

The weightiest of Mr. Du Cann's criticisms is his point that the procedure of the courts is accusatory and not inquisitorial. A struggle is staged in which each team tries to pull the balance as hard as possible over to the one side or the other. Hence the violent oscillations, as prosecution or defence win a temporary advantage, hence the drama of the scene, hence the intrusion of powerful but irrelevant motive forces, such as the skill of the pleader. When the whole course of the trial is designed to interfere with any cold-blooded appraisal by the jury, it is a miracle that their common sense prevails as often as it does. But the battle is relentless. Neither side will concede a point which can possibly be maintained, even in the face of a total lack of evidential support. The medical witness finds himself in a peculiarly invidious position. The tradition of having all witnesses called by one side or the other casts the shadow of partiality over all he says. Counsel on his own side tries to push him just as far as he can be made to go, and it is rare

for him to retire from the box without being trapped into expressing an opinion with greater confidence or emphasis than in a cool moment he would think justified. Lawyers complain bitterly about the way in which experts can be brought to disagree with fellow experts; but it is they who have forced this situation. I know any number of senior colleagues who refuse to be called in this capacity, because they know they will not be allowed to stand squarely between prosecution and defence, leaning neither to one side nor the other. The courts never see these men. The expert witnesses they get have been shopped for, by an agent who hires not the most balanced opinion but the warmest protagonist. I see no solution for this absurd state of affairs, except that witnesses should be called by the court. On appearance, they should be examined by the judge or the judge's assessor, and cross-examined by both of the opposing counsel. No good scientific witness would object, even to the most gruelling examination, provided it were carried out with respect for his good faith, instead of with the implicit suggestion that he is, himself, out to make a case.

Finally, we must not forget the fantastic cost in public money of these unseemly battles. If at an early stage the two sides could agree on what matters were so well established as to be acceptable without debate, and the matters which would have to be thrashed out, much time would be saved and things would be much easier for the jury. The oscillations of the scales would be less violent, and one could have a firmer hope that the instrument, more delicately held, would find an end-point nearer the true equipoise. Quicker trials in a less fervid atmosphere would speed justice and save much human distress.

I am told that the problem of delinquency and crime is graver now than it has ever been. Everyone is blamed for this, parents, teachers, doctors, psychologists, public welfare officials, everyone but the men whose proud claim it is to be the peculiar guardians of all that is law-abiding. We accept this claim; but we ask them to consider how far their antiquated methods have contributed to the present situation.

Eliot Slater.*

* M.D., F.R.C.P., D.P.M.; Director of the Psychiatric Genetics Research Unit, Institute of Psychiatry, Maudsley Hospital.

UNIFICATION OF EUROPEAN PATENT LEGISLATION ON THE COMMON MARKET *

I

THERE are two reasons why I am especially grateful for having been invited to speak in England and in this famous British School about the "Unification of European Patent Legislation on the Common Market."

One reason is that it was in this country that in a case decided three hundred and fifty-nine years ago the following argument was addressed to the court:

> "I will show you how the judges have heretofore allowed of monopoly patents, which is, that where any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before: and that for the good of the realm: that in such cases the king may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth: otherwise not." [1]

This argument did not then prevail, but the principles that it expressed were soon to be embodied in legislation which was the starting point of the English patent system, and it represents at the same time a classical dictum for all other countries.

The other reason is that your country is the "big brother" in the EFTA-agreement of 1959 uniting seven countries (including my country) into a powerful part of a Common European Market. In my view no serious progress in the field of legal unification or harmonisation of patent laws of Europe can be achieved unless a real interest in these questions is aroused in *your* country.

In a single lecture only a few of the primary problems can be touched.

II

Efforts to unify patent legislation in different parts of the world or, at least, to simplify and create greater harmony between patent protection sought by inventors in different countries, are no new phenomena. Both Napoleon Bonaparte and Hitler introduced by force unified legal systems in occupied countries which, amongst

* A Public Lecture delivered at the London School of Economics and Political Science in May 1961.

[1] Edward Darcy, plaintiff, Thomas Allin of London, defendant (the *Case of Monopolies*) (1602), in Noy, 173 at 182, *per* Fuller, *arguendo*.

other things, temporarily led to unified systems of patent protection; the former in countries which we today call Belgium, the Netherlands and parts of Italy, and the latter (Hitler) especially in Austria. A more durable—and entirely peaceful—propelling power in this direction was expressed in connection with the world exhibitions held in Vienna (1873), Philadelphia (1876) and Paris (1889), laying the foundation of the International Paris Convention of Industrial Property Rights, today shared by most nations of the world (except for Argentina, China and the Soviet Union).

In connection with these trends considerable influence on international legal co-operation is also due to the work of the large private organisations such as the International Association for the Protection of Industrial Property, the so-called AIPPI, submitting extensively prepared resolutions and recommendations for use at the so-called diplomatic conferences of revision of the Paris Convention.[2]

This organisation has set up an extensive programme to study unification of patent laws in pursuance of a unanimous resolution adopted at the London Congress of June 1960, comprising the problems of definition of patentability, conditions of novelty of an invention (absolute or relative novelty, facts constituting prior art, disclosure of the invention by the inventor, industrial utility, " degree " of an invention and technical advance) as well as the questions of unpatentable inventions (chemical and pharmaceutical products, food products and " vegetable novelties ").[3] The various national groups of the AIPPI are still working hard on these problems.[4]

A certain amount of agreement on basic concepts of patent law on government level was reached in 1906 by South American countries in the Panamerican Union and in 1922 by the countries of the British Commonwealth.

The first group of countries starting a more radical unification of national patent laws seems, however, to have been the Scandinavian countries, beginning in 1938. Times of war did not encourage carefully planned co-operation of this type. The first event of practical importance in this field is, therefore, represented by the agreement of the Benelux countries and France in 1947 creating a common institute of novelty search in The Hague for patent applications originating in these countries, which, in 1958, were joined by Switzerland.

In 1949 the European Council started extensive plans on a larger

[2] Compare for example, summarising report by P. Haas in *Gewerbl. Rechtsschutz u. Urheberrecht, Auslandsteil*, August–September 1958, p. 369 *et seq.*

[3] AIPPI, *Annuaire* 1960, Nouvelle Série No. 10, 2ème Partie, *Résolutions et Voeux du Congrès de Londres*, p. 19 *et seq.*

[4] Compare, for example, report of the German group by W. Cohausz, " Arbeitsmethode u. Vorbereitungsarbeiten für die Vereinheitlichung der Patentgesetze," in *GRUR Auslandsteil*, April 1960, p. 188 *et seq.* and draft report of the British group by the Hon. Hugh Fletcher-Moulton (Jan. 1961).

regional basis for a common European Patent Office and a so-called "European patent certificate." These plans required much preliminary inquiry into the present state of national patent legislation in Europe. This analytical work is still going on for substantial parts of European patent law and has up to now led to the adoption of two minor international conventions; one concerning the unification of formalities for seeking patent protection in Europe, and the other concerning a common international patent classification system. Experts from five member countries have been called upon by the European Council to submit studies surveying the existing rules of patentability in various European countries and other basic legal provisions. This work, which was delegated to the council member countries (France, Germany, Belgium, Switzerland and Sweden) is, of course, of a protracted nature and is still not finished at the present time.[5] Summing up, it can be said that at the end of the Second World War there existed a fairly widespread determination to overcome the narrow-minded nationalism which once had created patent laws, mainly in the nineteenth century, in order to protect national industrial production against dangerous foreign competition.[6]

III

Today, more than a decennium later, we are confronted with a more urgent situation. The conclusion of the Rome treaty between the six continental Powers in March 1957 and the Stockholm treaty between the so-called outer-Seven Powers in December 1959 are both aimed at removing all serious trade barriers in European trade, although the EFTA treaty of 1959 is only a free trade arrangement of a looser character than the Six-Power Agreement. As is well known, the Rome treaty includes a section (100) which permits its steering council to issue guiding rules in order to harmonise legal and administrative rules which have a direct impact upon the organisation of the Common Market and its way of functioning. If the steering Commission of the Six-Power Convention finds differences in national laws that are apt to distort conditions of equal competition on the Common Market, negotiations may be started with member countries in order to remove such obstacles. This group of nations had therefore from the beginning the possibility and power to change or remove provisions in the national laws of member countries obstructing or preventing the purpose of their common convention.

There is hardly any doubt that the patent laws valid in the Six-Power group as well as in the EFTA countries in many respects may

[5] A draft for an international (European) convention as to rules for patentability and exemptions from patentability, conditions of novelty of inventions, so-called prior right to an invention, test of sufficient technical progress ("Erfindungshöhe") and shape of patent claims, has been prepared and will be discussed in the Council of Europe meeting in November 1961.

[6] British, American and French patent laws had been passed much earlier (in 1623, 1787 and 1791 respectively).

clearly function in opposition to the purposes of a Common Market (irrespective of how large this market is at the present time).

The experts of the secretary-general of the Six-Power organisation in Brussels are quite aware of these facts and they launched in November 1959 a central attack against existing patent legislation in Europe, the meaning of the term " Europe " being strictly limiting to the six signatory Powers of the Rome treaty.[7] The radical suggestions made in this " Groeben plan " are intended to culminate in a totally unified European patent and trademark legislation, giving up the basic principle of territoriality of national industrial property rights at the end of the transitional period of the Common Market (in 1969?).

Originally it had been my intention to ignore the details of this plan, but in view of the distinct possibility of a more imminent co-operation between the Six-Power group and England I have a strong feeling that the Groeben plan sooner or later may become a basis of negotiations between the Six-Power and EFTA countries in this field. Von Groeben notices that already the fact that an invention, a design or a trade mark may exist in some member countries, whereas there is general open access to it in other countries, limits competition in the countries where monopoly rights exist and thereby dislocates the intended equality of competition in all countries belonging to a Common Market. Even assuming that legal protection exists in *all* member countries difference of legislation often results in a different range of protection to the owner of such rights. These facts can have a decisive influence upon the choice of a place to start the manufacture of goods or a selling organisation. According to Von Groeben an adaptation of the national laws would help to strengthen these property rights and " unload (discharge) law provisions from the historical and dogmatic reasons existing in each country " as well as saving time and costs.[8] In spite of the fact that far-reaching legal, economic, administrative and financial consequences are expected, the Brussels commission asks for a new international convention between the Six Powers, creating a unified law system of industrial property, valid in all six countries in the same manner.

The preparations for such a convention were divided between member countries and the draft regarding the patent field was delegated to the Federal German Department of Justice. This report is ready now, but is still restricted to Six-Power representatives. It seems likely, however, that European patent applications will be published without any novelty search and a statement on novelty, attached to the application, be written by the International Patent Institute in the Hague. Formally the new European patent

[7] H. von der Groeben, " Rechtsangleichung auf dem Gebiete des gewerblichen Rechtsschutzes im Rahmen der Europäischen Wirtschaftsgemeinschaft," in *Gewerbl. Rechtsschutz und Urheberrecht*, Auslandsteil, December 1959, p. 629.
[8] *Op. cit.*, p. 630.

convention may not become a part of the Rome treaties (which besides the Six-Power agreement also covers the Euratom treaty intended to develop the " nuclear industries " of the six member countries and containing a series of remarkable patent provisions).

What seems basic to me in view of these likely features is that the EFTA countries should not just sit back until they are allowed to join such a Convention in a secondary capacity as a kind of late developed and less gifted child but should immediately discuss and shape a basic plan of unification of patent legislation in their group of countries. Such a plan could at the same time pay regard to important principles of patent law valid in the Six-Power group, where Germany and the Netherlands should be considered the countries most experienced in patent law and jurisprudence.

IV

Without adopting a unification plan as far-reaching as the one suggested and worked out by von Groeben on behalf of the Six-Power group, there are, no doubt, a number of primary tasks to be solved in the legislation of EFTA countries. These laws need changes and co-ordination since in their present state they definitely prevent the carrying out of the free trade as stipulated in the Stockholm agreement of 1959.

There exist differences both in material patent law and in patent law procedure. The importance of these differences for the working functions of a Common Market varies, however, considerably.

A. The primary legal task seems to be to create the same or a similar novelty concept underlying the grant of patents of invention, and in connection therewith, at the same time (as a paramount practical aim) to simplify and concentrate the so-called novelty search, made by patent office examiners in all countries prescribing such search. Excepting Portugal, all EFTA countries have some type of novelty concept making novelty search necessary as an *ex-officio* duty of the Patent Office. On the Six-Power side France and Italy lack a novelty concept which forces the Patent Office to make a novelty search before granting a patent. Extensive requirements for possible anticipation of a field patent application, both geographically and as to the period of time, are prescribed within the EFTA group by all Scandinavian countries and, on the other side, by Germany and Holland. All publications, in any country and at any time before the filing of a patent application without limitation, prevent the grant of a patent in these countries. This " absolute " rule of novelty (independent of time and place) is now in principle recognised by the patent committee of the Council of Europe. The common rule of novelty under discussion in the Scandinavian countries is in line with this enlarged concept of novelty. A lack of novelty is held to exist if the invention is shown

or described in generally accessible documents or pictures (not necessarily " published ") or so publicly used at any place that a person skilled in the respective art could use the invention.[9] The United Kingdom's Patent Act takes a kind of intermediate position by limiting novelty search geographically to the United Kingdom and, as to time, to a date within fifty years prior to the filing date. Another circumstance preventing the grant of a patent is prior use of the invention by another party than the applicant before the filing date or priority date. This obstacle to novelty is in the United Kingdom limited to use in the country itself; the same is the case in all other EFTA countries except for Sweden and Portugal, where prior use prevents novelty of an invention irrespective of where it had taken place. France, Belgium and Holland follow the Swedish rule, whereas Germany belongs to the same group as England and the EFTA countries.

B. As mentioned at the beginning of the lecture it was urged in England already in 1602, in the case of *Darcy* v. *Allin*, that any monopoly patent should be granted " for some reasonable time." This rule was introduced in all patent laws, but unfortunately " this reasonable time " varies in most countries. Whereas the term of a patent is seventeen years from the day of filing in all Scandinavian countries, it is fifteen years from the same date in Italy, eighteen years in Germany and Switzerland, twenty years in France and Belgium. No definite length of term can be given in Holland and Austria, since in the first-mentioned country the life of a patent dates from the day of the *grant* of the patent and in the second-mentioned country (Austria) the term dates from the day of acceptance of the specification and is eighteen years. A unified starting date and the same term of life for European patents would obviously be very desirable in a Common Market.

C. A still worse trouble is represented by the provisions for compulsory licences in European patent laws. Compulsory licensing is meant as a legal step to force a patent owner to give away part of his monopoly right (after a certain interval of time) in exchange for a royalty payment or eventually free of cost to an outside applicant able to prove the so-called abuse of the patent, normally constituted by the non-use of the invention by the patentee.[10] Such provisions are for instance to be found in the laws of Sweden, Denmark, Austria, Switzerland as well as in France and Germany. " The

[9] Compare B. Godenhiem, Second Letter from Scandinavia, in *Industrial Property Quarterly*, No. 1, 1958, 21 *et seq.* at 23; and A. von Zweigbergk, Nordische Zusammenarbeit auf dem Gebiete des Patentwesens, in 60 *Jahre Osterreichisches Patentamt*, 1899–1959, Wien 1959, 199 *et seq.* at 202.

[10] Compulsory licences totally free of cost have been ordered in the U.S.A. by certain federal courts in anti-trust cases.

public interest " as an express ground upon which compulsory licences are granted is found in the patent acts of Austria (section 22a) and Switzerland (sections 37 and 40) as well as of Holland (section 34) and Germany (section 15). A " public interest " in the grant of compulsory licences has been motivated by a number of different reasons such as improving the balance of trade or industrial employment of a country (German Supreme Court decisions of the 1920s and 1930s).[11]

Another type of legislation cites the specific grounds upon which application for a compulsory licence may be based. A typical example is the United Kingdom, in its Patents Act of 1949 carefully listing the different grounds on which such a licence may be granted; for example, that the patented invention is not commerically worked in England or not worked to the fullest extent that is reasonably practicable, that the demand for the invention is not met on reasonable terms or not met to a substantial extent by importation, that commercial working is prevented by importation, that by refusal to grant a (voluntary) licence on reasonable terms a British export market is not being supplied, or that the establishment or development of commercial or industrial activities in England is unfairly prejudiced, and for a number of other reasons (sections 37 and 39). Grounds for compulsory licences of this type are not limited to the United Kingdom, but are to be found in other European countries, although not in the actual wording of a legal text but instead expressed by court decisions of a precedent nature.

Such provisions are clearly in opposition both to the spirit and to the practical aims of a Common Market. Such a market, comprising a plurality of countries no longer separated by custom barriers and other man-made commercial obstacles, has amongst its purposes that of making possible the manufacture of new products or the introduction of new methods of production into any market country where conditions for realising these developments are favourable. These conditions may concern cheap labour or raw materials, ample access to land, experienced experts or good communications, favourable selling position or other circumstances. Unification of law should therefore, regarding *this* provision, be attained by abolishing the remedy of compulsory licences for patents, executable in all countries belonging to the common market. I am aware of the difficulty of carrying out such a radical measure at once, but a gradual abolition—started immediately—should suitably pave the way for a definite international liberalisation of the use of patented inventions. Indeed, the hampering effect of a narrow national compulsory right of use on international trade as applied by the law of individual nations was felt long

[11] For a comparison of these decisions and the legal situation in other European countries: see F. Neumeyer, Compulsory Licensing of Patents under some Non-American Systems, Study No. 19, Sub-committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, US Senate, 85th Congress, Second session, Washington DC, 1959.

before common markets were created in Europe. Several countries have concluded bilateral agreements to eliminate the effect of such a legal provision. Germany, for instance, had concluded a series of such agreements as long ago as 1891 (with Austria), in 1892 with Italy and Switzerland, in 1909 with the United States and in 1925 with Greece. Common market countries could today start in a similar way by concluding bilateral agreements letting the working of a patented invention in one country count for working in the other country. Such agreements would, however, only be a temporary expedient. What is needed in a common market is a multilateral agreement neutralising the detrimental effects of national compulsory licence provisions. There still remains the danger that, as long as this common market does not comprise all industrial nations, an artificial wall is built up against all countries outside the area of multilateral legal cooperation. In the light of the above reasons, invalidating these national provisions and substituting common regulations seems to be one of the primary tasks of unification.

D. Substantial differences of law are also found in European patent laws as to judicial treatment of the validity of a granted patent and of infringement of a patent. The ideal solution of these differences from a European point of view would of course be a common European court of patent matters as suggested as early as 1953 by the late German Commissioner of Patents, Reimer, in the Council of Europe.[12] Extensive preliminary legal analysis is, however, necessary in order to find a common denominator for the grounds on which proceedings in such a common court can be taken and relief be granted.

E. Another field, to which much too little attention has been paid yet, is the law of employed inventors. We all know that an ever-increasing part of the working population today is dependent upon an employer of one kind or another. This is the case with inventors who are employed either by industry, by government agencies or by research institutions of various kinds. The rights and obligations of an employed inventor can in principle be governed by four different methods: by special laws, by provisions forming part of patent laws, by precedents issued by courts or administrative bodies, or eventually by a series of collective bargaining agreements common to certain industrial branches or certain professional groups.

Within the " Outer Seven " region Sweden and Denmark have had special laws for employed inventors since 1949 and 1955 respectively. Norway and Finland plan to introduce special laws during

[12] Compare E. Reimer, *Europäisierung des Patentrechts*, p. 91 *et seq.* (Munich, 1955).

1962, closely modelled on the Swedish—and Danish—ones; Austria has had a pioneering regulation of these relationships as part of her Patent Act ever since 1898; England has a long series of court precedents since the beginning of the nineteenth century, partly developed from the old master and servant rules (but unfortunately not codified in any way), and Switzerland is following a provision in her law of contracts (the so called "Obligationenrecht") with a somewhat patriarchal attitude similar to the British one. On the Six-Power side Germany has had a special law since 1957 similar to the Swedish one. We find in Holland and Italy a regulation within the frame of the Patents Act, but no legal provisions at all on this matter have been issued in France and Belgium. In spite of this seemingly discordant legal situation in Europe there is in fact a body of basic problems the solution of which has been developed in a somewhat similar way in most of the countries mentioned and which could be used as a basis for a common or at least a similar regulation.[13] It must be mentioned here that a unification of the primary rights and obligations of both parties on the labour market may eventually be taken up next year for discussion by the International Labour Office in cooperation with the International Berne Office (now Geneva Office) of Industrial Property Rights. In this connection I would like to emphasise that the demand for unification in this field is not a theoretical—or academic—one; there exist very practical difficulties for industrial firms in one country who desire to establish and operate new enterprises, especially subsidiaries, in another common market country, and who encounter considerable surprises when studying valid national law in this field deviating from all they had expected to find (or, perhaps more accurately, what they had never thought of). Also in this sector of law the present state of things represents a clear offence against article 16 of the EFTA Convention aimed against restrictions on the establishment and operation of economic enterprises and against other basic principles set out in this Convention.

F. A group of legal provisions in many countries affords a special position to chemical products, foodstuffs and medicines, as well as to metal alloys and plant varieties. If we regard as secondary the legal problems of unification regarding these categories of inventions, many people will be of a very different opinion and consider them as primary ones (for instance when representing assets belonging to large exporting industries). Undoubtedly, the question of patent protection of chemical products has attracted widespread international discussion. By very rough generalisation, we may state that, in the EFTA countries, Sweden, Norway, Switzerland, Austria

13 Compare the comparative law study of the author in 1961 *International Labour Review*, Vol. LXXXIII, No. 1, p. 36 *et seq.*

and Portugal and, in the Six-Power countries, Holland and Germany refuse patent protection to " chemical products " (*i.e.*, products produced by chemical reactions), whereas the United Kingdom and Denmark and, on the Continent, Belgium, France and Italy admit such protection to some extent. I cannot here explore the virgin forest of varieties of legal treatment given to special groups of substances such as beverages (which are mentioned in the patent laws of Switzerland and Italy), stimulants (mentioned in the laws of Austria and Germany) or fodder (mentioned in the Swiss law). There is still very little agreement in the way European countries treat this section of inventions. France excluded until 1960 from patent protection pharmaceutical compositions and medicines, but established by an Ordinance of February 1959 and a Decree of May 1960 the patentability of such products as a " special medicament patent," at the same time providing a system of authorisation and control in respect of the exploitation of pharmaceutical specialities.[14] Italy admits protection of foodstuffs and beverages, but only after consultation with the official health authorities (which is said virtually to prevent protection being obtained). Great Britain surrounds the right of patenting " substances capable of being used as food or medicine or in the production of food or medicine," processes for producing such substances and inventions " capable of being used as or as part of a surgical or curative device " with special legal limitations which may consist of compulsory licences (section 41) or refusal to grant a monopoly right when such substance turns out to be " a mixture of known ingredients possessing only the aggregate of the known properties of the ingredients " (section 10 (1) (c)) or when the claimed new substance is " found in nature " (section 4 (7)).

Another difficulty on the road to unification in this field is that the definition of chemical substances, medicines and even foodstuffs nowadays in most countries is based on national laws regarding public health, the medical profession, dispensing chemists and a series of complicated laws regulating food production and food processing. But there is hope for the desired unification for remarkable new trends are becoming evident during recent years in a number of European countries. The strict prohibition of patent protection for medicines (to some extent also for foodstuffs) derives its roots from a social policy in public health as practised during the nineteenth century. Today's picture of the poor defenceless citizen, unable to afford to buy food and medicine basic for his health, is considered to be rather outdated. In countries with progressive social legislation this ideological background seems to have disappeared and no weighty reasons remain to exclude new valuable substances of these categories from patent protection. In

[14] Compare A. Casalonga, in *Journal of the Patent Office Society*, Washington D.C., September 1960, p. 630 *et seq.*; and P. Mathély, in *Industrial Property Quarterly*, Geneva, No. 1, 1961, p. 37 *et seq.*

agreement with such reasoning the Scandinavian countries decided to submit a unanimous report to the executive meeting of the International Association for the Protection of Industrial Property (AIPPI) in Ottawa in September 1961 announcing the wish to cancel the exemption of medicines and foodstuffs from patent protection in their respective patent laws. Critical voices against these traditional prohibitions of law are today also heard from experts in Germany and Austria.[15]

G. There is another sector of law that may have considerable impact upon patent rights, although not in itself part of patent legislation. I mean the laws directed against all kinds of restrictive trade practices, also called " cartel " or " anti-trust laws." Sections 85 to 90 of the Rome treaty prohibit five specified types of agreements which are likely to lessen or distort free competition on the Common Market, whereas the EFTA convention in its article 15 recognises only two restrictive trade practices as incompatible with the Convention, namely agreements and concerted practices between enterprises resulting in the prevention, restriction or distortion of competition within the area of the Association, or actions by which enterprises take unfair advantage of a dominant position within the area of the Association. Ever since the conclusion of the Rome treaty experts in the Six-Power countries seem to have been very much worried about the consequences which the provisions of the treaty regarding restraint of free competition may have on industrial property rights.[16] The definitions of undesirable restrictive practices in the EFTA convention are, no doubt, fewer and less categorical than the ones of the Rome treaty. Divergence of national cartel laws in the EFTA countries is unfortunately quite striking, both in general and concerning patent rights. Austria is one of the EFTA countries expressly prohibiting the restrictive use of patents in her Patent Act of 1950 (sections 22a–22e). The United Kingdom

[15] Compare H. Tetzner regarding Germany, and A. Sonn regarding Austria, both in *Gewerblicher Rechtsschutz u. Urheberrecht, Auslandsteil*, March 1960, pp. 107 *et seq.* and 141 *et seq.*

[16] Compare for example, for Holland: papers of A. Lelij in *Octrooi en Merk* 1957, Voorburg, p. 185; A. J. M. Weebers in *N.V.* 1957, p. 86; G. H. C. Bodenhausen in *Soc. Econ. Wetg.*, Zwolle 1958, p. 4, and in *Gewerbl. Rechtsschutz u. Urheberrecht, Auslandst.* 1958, p. 218 *et seq.*; G. Oudeman--Chr. Kooij-J. Woltebeek in *Propriété Industrielle* 1960, p. 28 *et seq.*; for Belgium: papers of C. Del Marmol in *Fabrimétal* 1957, p. 492; M. Gotzen in *Propriété Industrielle* 1958, p. 69 *et seq.*; Vander Haeghen in *Les Aspects Juridiques du Marché Commun* 1958, p. 85 *et seq.*; for Germany: papers of A. Spengler in *Wirtschaft und Wettbewerb* 1958, p. 73; in *Gewerbl. Rechtsschutz u. Urheberecht, Auslandst.* 1958, p. 321 *et seq.*; A. Kellermann in *Gewerbl. Rechtsschutz u. Urheberrecht* 1959, p. 569 *et seq.* especially at 576; in *Wirtschaft und Wettbewerb* 1958, pp. 58, 643 *et seq.*, and 1960, p. 603 *et seq.*; for France: papers of Finniss in *La Revue du Marché Commun* 1959, p. 15 *et seq.*; Y. Saint-Gal in *ZHR* 1958, p. 172 *et seq.*; in *RIPIA* 1958, p. 101 *et seq.*; and in *La Revue du Marché Commun* 1959, p. 187 *et seq.*; Marchal in *La Revue du Marché Commun* 1959, p. 373 *et seq.*

guards against the abuse of patent monopoly power in her Patents Act of 1949 (sections 37, 41). However the British Restrictive Trade Practices Act of 1956, by section 8 (4) and (5), exempts from registration under that Act restrictions regarding patented inventions and registered designs and agreements for the exchange of technical information and know-how. The Scandinavian countries register, as a rule, patent licence agreements in their cartel registers as being in restraint of trade which, however, does *not* mean that they are automatically considered illegal or invalid.[17]

Finally it should be mentioned that the European Coal and Steel Union also contains provisions directed against restraint of trade (sections 65 and 66) but makes interesting exemptions regarding the exchange of patents.[18]

H. In sketching some of the problems of patent legislation I do not want to exaggerate the importance of such measures. Laws and international agreements are made by men for the benefit of men. Without the good intentions of responsible leaders and the hard pressure of powerful economic and political forces which set such instruments of cooperation in motion, laws usually remain dead letters.

The inventive powers of men which we have pledged to protect by patent laws are, however, one of the mainsprings of the growth of industrial development and they will not disappear in our time. Furthermore, patents of invention will always be practical tools in the hands of enterprises for selling or exchanging engineering processes emanating from different parts of a common market. Patents are also useful for encouraging the creation and operation of subsidiaries or new enterprises in foreign countries, especially if they are accompanied by know-how of a practical nature.

In these days we need only to open a newspaper in order to learn that European nations want to cooperate practically, for example in the macrocosmos of the space and in the microcosmos of the atom. While I admit that the basis of such cooperation is of a highly scientific character, the reduction to practice of these desires demands extensive application of *practical* chemistry, electricity, optics, acoustics, metallurgy and other branches of natural science. It is our engineers, designers and workmen who will make spaceships fly and radioactive isotopes work to measure. Improvements of systems and machinery are made by men of various nationalities. Unless published in scientific publications, engineering developments brought about by these men are often protected by national patents owned by national manufacturers, institutions or individual experts.

[17] Compare for an international survey: F. Neumeyer, "Patent und Beschränkung des Wettbewerbes" in *Wirtschaft und Recht*, Zürich, Vol. 12 (1960), No. 4, p. 240 *et seq.*

[18] In February 1961 a French member of the Union asked for an interpretation of these provisions: see *Wirtschaft und Wettbewerb*, May 1961, p. 368.

Now, article 2 of the Convention establishing the European Free Trade Association wants us to create "a sustained expansion of economic activity, full employment, increased productivity and the rational use of resources, financial stability and continuous improvement in living standards." If we want to promote this purpose we cannot close our eyes to the urgent tasks ahead of us in this field.

Finally I want to stress only one more point. As we can see, plans for international cooperation in space research or atomic energy production obviously neglect the frontiers drawn between the Inner Six and the Outer Seven. In this family the British are just as welcome as the French; the Germans as the Scandinavians. Any efforts to unify national legislation, therefore, will in the long run not stop at the artificial frontiers erected by the Rome treaty and the Stockholm treaty. The situation today is, however, that the Six are going ahead rapidly with plans to unify patent legislation, and the Seven—not officially urged to do such work by their free trade cooperation agreement—stand by and wait and see.

The purpose of this lecture is to appeal for serious preparation in the circle of our seven countries—with British experts intensively taking part—thus meeting the challenge of the Six by carefully worked out drafts of assimilated patent legislation fitting into the work currently done in Brussels.

The spirit revealed in the speech of the then President of the British Board of Trade, the Rt. Hon. Reginald Maudling given before the Chartered Institute of Patent Agents on October 25, 1960, is encouraging. Proposals at present being worked out by the British Patent Office for the Patent Committee of the Council of Europe may soon give an answer to some of the questions I have raised here.

FREDRIK NEUMEYER.*

* Head of the Patent Department of the Swedish State Telephone and Telegraph Administration; Dr.Ing.(Dresden), Dr.Rer.Pol.(Berne).

STATUTES

Trustee Investments Act, 1961

This Act [1] received the Royal Assent on August 3, 1961, and came into force on the same day.

Trustees can invest their trust funds only in investments authorised either by the express terms of their trust instrument or by statute. Before this new Act the investments authorised by statute did not include any " equities " and were a limited range prescribed, in England by the Trustee Act, 1925,[2] and in Scotland by the Trusts (Scotland) Act, 1921,[3] with subsequent statutory extensions.[4] Generally speaking, the statutory Trustee List was restricted to stocks issued by the British Government and by the governments of Commonwealth countries and the colonies, stocks guaranteed by the British Government, stocks and mortgages issued by British local authorities, and mortgages of land in Great Britain. Most of the investments in the List earn interest at a fixed rate and, with certain notable exceptions,[5] are eventually repayable at par.

In recent years there have been serious disadvantages in the old List. The immediately realisable market values of investments eventually repayable at par have fluctuated widely, with the variations in the prevailing rates of interest; and, in the case of the " undated " stocks in the List, market values have declined very seriously.[6] Eventual repayment of invested capital at its nominal par value takes no account of inflation and the decline in the value of money, and represents, in real values, a capital loss. In the case of a trust fund established twenty or more years ago, with investments limited to the statutory List, the annual trust income may be nominally the same today as when the trust began, although of course the income will buy far less than when the trust began. A life tenant depending for his income and standard of living on such a trust would be much worse off today than twenty years ago; and the real value of the trust capital may be disastrously less than when the trust began. This sort of case history is, unhappily, not unusual.

[1] 9 & 10 Eliz. 2, c. 62.
[2] 15 & 16 Geo. 5, c. 19.
[3] 11 & 12 Geo. 5, c. 58.
[4] The subsequent statutes cannot usefully be enumerated here. Reference should be made to, *e.g.*, Underhill's *Law of Trusts and Trustees* (11th ed. 1959), pp. 336–343. A notable recent statutory extension of the Trustee List was by the House Purchase and Housing Act, 1959 (7 & 8 Eliz. 2, c. 33), s. 1, which permitted the deposit of trust money with certain building societies designated for this purpose by the Chief Registrar of Friendly Societies.
[5] For example, 2½% and 4% Consols and 3½% War Loan.
[6] On September 15, 1961, £100 (nominal) of 2½% Consols had a market value of only £38 6s. 3d.

The statutory Trustee List has always had two objects: first, the protection of trustees; secondly, the protection of the beneficiaries, by ensuring both the preservation of trust capital and a steady yield of income. The first object has always been successfully achieved. Trustees who invested within the range permitted by the statutory List were reasonably safe from legal attack by disgruntled beneficiaries. But, for more than twenty years before the passing of the new Act, the second object had not been achieved at all. The statutory List (which was always somewhat out of date [7]) provided no " hedge " against inflation and no protection against the continuous fall in the value of the £. Experience of investment within the range provided by the statutory List offered a sad contrast with the profitable experience of other people able to invest in equities.

For years most lawyers have advised settlors and testators to confer on their trustees much wider investment powers than those permitted by the statutory List. In the House of Lords debate on the Second Reading of the Trustee Investments Bill a peer who is a solicitor of great experience said: " In the course of some forty years of practice I have made it a point always to advise that settlors and testators should leave the widest possible discretion to their trustees; that the powers contained in the Trustee Act were far too limited." [8] Naturally enough, the demand for reform of the List has grown and has commanded some powerful supporters. In 1952 the Report of the (Nathan) Committee on the Law and Practice relating to Charitable Trusts [9] advocated reform. In 1955 a White Paper on Government Policy on Charitable Trusts in England and Wales [10] referred to the Government's intention to propose a general reform of the statutory List. Charities were already able to obtain from the court a general extension of investment powers; and, particularly after a decision [11] in 1955 drew professional attention to this, a number of the larger charities obtained wide powers of investment in the ordinary and other shares of the larger companies. In 1958 the Variation of Trusts Act [12] permitted applications to the court for (*inter alia*) extended powers of investment; and applications under that Act were soon very widely used for the purpose of obtaining power to invest in equities.[13] But applications to the court cost money, and the power conferred by the 1958 Act was no substitute for general reform of the statutory List. On

7 See, for example, s. 1 (1) (*g*) of the Trustee Act, 1925, authorising investment in the stocks of railway companies.

8 226 H.L.Deb. 929 (November 28, 1960).

9 Cmd. 8710. Paras. 289–293.

10 Cmd. 9538. Para. 18.

11 *Re Royal Society's Charitable Trusts* [1956] Ch. 87.

12 Remedying a defect in s. 57 of the Trustee Act, 1925, which did not authorise the court to grant a general extension of investment powers, although it did enable the court to permit the making of particular investments that would otherwise be unauthorised.

13 See, *e.g.*, *Re Coates' Trusts* [1959] 1 W.L.R. 375. For the *form* in which extended investment powers are normally granted to private trustees under the 1958 Act, see *Re Thompson's Will Trusts* [1960] 1 W.L.R. 1165.

May 13, 1959, a statement in the House of Lords [14] promised early legislation; and in December 1959 a White Paper [15] was published setting out the Government's proposals. These proposals, with some minor changes, were embodied in the Bill introduced into the House of Lords in November 1960.

The period of almost a year between the publication of the White Paper and the introduction of the Bill was intended to provide time for interested persons and bodies to consider, and make representations about, the Government's proposals. This was a good idea, and the time was not wasted; but the period might have been more useful if the White Paper had included a draft of the intended Bill. The Bill, when published, turned out to be quite complicated; and it soon received anxious scrutiny from professional bodies, including the Law Society, whose simplifying amendments were debated at length when the House of Commons was considering the Bill in committee.

The Act replaces the former statutory Trustee List. The new List, set out in the First Schedule to the Act, is divided into three parts. Parts I and II list the " narrower-range " investments. Part III lists the " wider-range " investments.

The narrower-range comprises mainly fixed-interest investments, and includes the whole of the former statutory List with some changes and additions. These additions include fixed-interest securities issued by local and public authorities in the Commonwealth [16]; fixed-interest securities issued in the U.K. by the International Bank for Reconstruction and Development [17]; the debentures (not being convertible debentures) of United Kingdom companies that comply with certain conditions [18]; and deposits in the ordinary and special investment departments of trustee savings banks.[19] Commonwealth government stocks [20] are included in the narrower-range without the governments concerned having to comply with the conditions laid down in the Colonial Stock Acts.

The difference between Part I and Part II of the narrower-range is that trustees may invest in Part I without first obtaining advice, whereas they may not make an investment in Part II of the narrower-range without obtaining and considering proper advice as to the suitability of the investment.[21] Part I is very simple. It includes Defence Bonds, National Savings Certificates and Ulster Savings Certificates; and deposits in the Post Office Savings Bank, in the ordinary departments of a trustee savings bank and in savings banks certified under section 9 (3) of the Finance Act,

14 216 H.L.Deb. 410.
15 Powers of Investment of Trustees in Great Britain. Cmnd. 915.
16 First Schedule, Part II, para. 4.
17 First Schedule, Part II, para. 5.
18 First Schedule, Part II, para. 6; Part IV, para. 3.
19 First Schedule, Part I, para. 2; Part II, para. 11.
20 First Schedule, Part II, para. 4.
21 s. 6 (2).

1956.[22] Deposits with designated [23] building societies are in Part II of the narrower-range [24]; and it is puzzling that trustees should not be allowed to make such deposits without obtaining expert, written advice.[25]

The greatest interest, however, attaches to the new wider-range. This includes the shares, stock and convertible debentures of United Kingdom companies that comply with certain conditions [26]; the shares [27] of designated building societies [28]; and units of authorised unit trusts [29] (*i.e.*, authorised by order of the Board of Trade under the Prevention of Fraud (Investments) Act, 1958, or by the Ministry of Commerce under the Prevention of Fraud (Investments) Act (Northern Ireland), 1940). The "equities" (*i.e.*, ordinary shares and stock) and other securities of U.K. companies are included in the wider-range only if the particular company has a total issued and paid-up share capital of at least £1 million and has paid dividends on all its issued shares in each of the five years preceding the year in which the investment is made.[30] As with Part II of the narrower-range, investments must not be made in the wider-range unless the trustees obtain and consider written expert advice about the particular investments.[31] Further, *trustees are not to make or retain investments in the wider-range unless their trust fund has been divided into two parts.*[32]

This once-for-all division of the trust fund is the most important (and controversial) feature of the new statutory scheme for permitting wider-range investments. The division must be into two equal parts [33]; but there is power [34] for the Treasury, by statutory instrument, to order that division shall be into unequal parts (provided that such an order shall not authorise a division in which the narrower-range part is less than one-quarter of the fund at the time of division). The division, once made, is permanent. Thereafter, funds belonging to the narrower-range part must be invested in narrower-range investments,[35] while funds belonging to the wider-range part may be invested in wider-range or narrower-range investments. It is not essential for the whole of the wider-range part to

22 4 & 5 Eliz. 2, c. 54.
23 Note 4, *supra*.
24 First Schedule, Part II, para. 12.
25 s. 6 (2) (4) (5).
26 First Schedule, Part III, para. 1; Part IV, para. 3. The same conditions apply to non-convertible debentures included in Part II of the narrower-range.
27 *Shares* as contrasted with deposits. *Deposits* are included in Part II of the narrower-range: see First Schedule, Part II, para. 12.
28 First Schedule, Part III, para. 2.
29 First Schedule, Part III, para. 3.
30 It is of interest to note that, in *Re Thompson's Will Trusts* [1960] 1 W.L.R. 1165 (see note 13, *supra*), the court approved investment in equities if the company concerned had a paid-up capital of £500,000.
31 s. 6 (2)–(5).
32 s. 2.
33 s. 2 (1).
34 s. 13.
35 s. 2 (2).

be invested immediately in wider-range investments. The *discretion* to invest in the wider-range is available only in respect of the wider-range part. If property is transferred from one part of the divided fund to the other, there must be a " compensating transfer " in the opposite direction.[36] Where any property accrues to a trust fund that has been divided, and the accruing property is not otherwise obviously attributable to some particular part of the fund, the accruing property must be divided so that each part of the fund is increased in value by the same amount.[37] Where capital is taken out of the trust fund (as, for example, in the exercise of the statutory power of advancement [38]), the trustees are not required to take it equally from the two parts of the divided fund: the Act does not fetter their discretion as to the choice of property to be taken out.[39]

The new statutory powers of investment are *additional* to any special powers, *e.g.*, those conferred expressly by the will or settlement.[40] Any property (not including statutory narrower-range investments, but including statutory wider-range investments) which trustees are authorised to hold pursuant to such special powers, must be carried to a separate " special-range " part of the fund.[41] The effect may be that a single fund will be divided into three parts: the special-range part, the wider-range part and the narrower-range part.

Division of the fund into two parts and the subsequent maintenance of that division will require very careful administration and records; and even greater care will be needed where the division is into three parts. Will ordinary private trustees be able to do the necessary administration and keep satisfactory records? In the case of the larger trust funds, where the expense of obtaining constant professional assistance is not regarded as extravagant, the additional work will present no problem. But, with a relatively small trust fund, the trouble and expense may *perhaps* be too great, and the trustees may therefore decide that they cannot operate the statutory scheme for investment in the wider-range. The fear of undue complexity in the administration of relatively small trust funds led the Law Society to advocate a scheme permitting investment in the wider-range without a once-for-all division of the fund; but the advocacy was unsuccessful; the complexity remains; and time will show to what extent, in practice, trustees of small trust funds take advantage of the new power to invest in the wider-range.

[36] s. 2 (1).

[37] s. 2 (3). A bonus issue in respect of shares in the wider-range part would accrue to the wider-range part; and a " rights " issue is treated for this purpose as a new investment and not as an accrual.

[38] Under s. 32 of the Trustee Act, 1925.

[39] s. 2 (4). The Bill, as originally published, required advances to be taken equally from the two parts of the fund; but, happily, this requirement was abandoned.

[40] s. 3.

[41] s. 3 and the Second Schedule. S. 3 (3) should be read very carefully. Its effect is somewhat over-simplified in the above text.

The other provisions of the Act do not call for extended comment. Section 6 (1) is of interest in that it attempts a statutory definition of a trustee's duty in choosing investments. He must have regard—

> " (*a*) to the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust;
> (*b*) to the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description."

The new powers apply to persons and bodies, not being trustees, who have trustee investment powers.[42] Section 9 (1) amends section 10 (3) of the Trustee Act, 1925 to remove a defect (disclosed in *Re Walker's Settlement* [43]) which has occasionally caused trouble where trustees hold shares in a company that is the subject of a " take-over " bid. Section 11 enables local authorities to pool their funds for purposes of investment. Section 12 permits the new powers to be extended and varied by Order in Council, subject to annulment by resolution of either House of Parliament. Section 15 expressly provides that this new enlargement of statutory investment powers is not to lessen the court's powers (*e.g.*, under the Variation of Trusts Act, 1958) to confer wider powers of investment, and is not to affect the extent to which such powers are exercised.

This Act represents an overdue, and very welcome, reform of the law about trustees' investment powers. The welcome for the Act is accompanied by fear that its requirements may prove too complicated for the trustees of small private trusts; but it is to be hoped that this fear will prove unfounded. In any case many wise settlors and testators will continue to confer on their trustees unrestricted investment powers [44]; and such trustees will not have to divide their fund or rely in any way on the new statutory scheme.

LEOLIN PRICE.

[42] s. 7.
[43] [1935] Ch. 567.
[44] See the text at note 8, *supra*.

REPORTS OF COMMITTEES

Compensation for Victims of Crimes of Violence

It was typical of the late Miss Margery Fry that her concern with crime and delinquency was not limited to the treatment of offenders but extended to the victims of crime. As long ago as 1953 she was advocating that there should be a scheme for compensating the victims of personal violence, but that the obligation to such victims rests primarily upon the society which has failed to protect him, and which alone can adequately compensate him. The Home Secretary in his White Paper, *Penal Practice in a Changing Society*, took up her thesis and set up the Working Party which has produced this report.[1]

There seems little doubt but that public support for the idea of compensating the victims of violent crime is increasing, not so much from the reformist standpoint of Miss Fry, but from those who would like to see a return to more repressive measures for dealing with violent offenders. The idea seems to be that the criminal must make personal recompense to his victim as well as pay his debt to society.

The notion of restitution is by no means novel, though broadly speaking it has scarcely concerned the criminal courts at all, if only because offenders are generally without the means to pay appreciable sums of compensation. For this reason, the victims of crime hardly ever proceed with actions in the civil courts, even when their assailants are known. From every point of view it would seem a good thing that offenders should make some restitution to their victims, but if they are unable to do so, or the courts cannot successfully compel them to do so, some would argue that it does not automatically follow that it is the duty of the state to intervene. The case of violence, however, seems to be a special one, in that while the state cannot reasonably be expected to protect the citizen from every criminal act—for example from a fraud which may have been assisted by his own cupidity—it has a duty to protect his person from physical injury, especially in public places.

The Working Party was concerned only with the practical problems involved in administering a scheme of compensation from public funds for the victims of violent crime. They studied two possible schemes, one, analogous to the Industrial Injuries scheme, whereby weekly payments would be made for " loss of faculty "; the other a scheme whereby the victim could claim a lump sum of damages from the Home Secretary and have his entitlement decided by the courts in the absence of a settlement out of court. In either

[1] Cmnd. 1406 (1961).

scheme, there might be provision to enable the Government to recover the cost of compensation from the offender to the extent to which it was practicable to do so.

The Report is quick to point out that they found both schemes fraught with a multiplicity of difficulties, particularly in cases where the offender was not brought to justice. Moreover it suggests that the costs of administering either scheme might be heavy in proportion to the cost of payments made to comparatively few beneficiaries. The Report accepts the view that compensation ought not to depend upon detection or conviction; on the other hand it suggests that the state has no duty to protect citizens from violence except perhaps in such circumstances as civil riot. It reasons that, superficially at least, other forms of crime may be equally deserving of compensation, but any general scheme of compensation for crime would almost certainly be unworkable. If the violent offender is to make personal restitution, this also raises difficulties—should restitution be added to the legal penalty of, say, imprisonment? Even if prison earnings were made realistic, might other charges upon his earnings, such as the cost of supporting his family and paying for his maintenance in prison, be given a higher priority than restitution to his victim? And could restitution be enforced without resort to what the Report rightly terms the " controversial device of attachment of wages "?

A major problem, which the Working Party were equally quick to light upon, was a precise definition of violence, particularly where the assault is of a sexual nature. Ostensibly, however, there is no reason why this could not be overcome, and from the categories of offence listed in the Criminal Statistics, an acceptable list drawn up. More difficult is the question of the character of the claimant and his partial responsibility for what has occurred to him. A high proportion of violent crimes take place in the course of family quarrels, brawls, and internecine feuds between professional criminals in which the element of " victim precipitation " is not inconsiderable. Unfortunately, some of the most vocal advocates of compensation overlook this fact, that being a victim is not synonymous with complete innocence. On the other hand there are victims who are genuinely innocent, for example, the bank guard or cashier who is injured in the course of a robbery, yet the Report is quite categorical in describing the proposition that the state, if it fails to protect its citizens from unlawful violence has a duty to compensate them, as " both fallacious and dangerous." If it is fallacious because the state can never entirely prevent injuries from individual acts of personal violence, then it is equally fallacious that the state should pay social benefits to alleviate destitution because sickness and unemployment cannot be entirely prevented. And if social welfare payments (often in excess of the sum of the individual's insurance contributions) represent a generous act of grace on the part of the state, there is surely a good case for extending

such generosity to the innocent victims of violent crime. Nor is the proposition dangerous because it " could be the basis of a demand for acceptance of liability for all offences against property." Many property offences arise, not out of shortcomings of the state, but from the irresponsible negligence of private citizens, and it is remarkable how few householders and motorists listen to the continuous exhortations of the police to take even elementary steps against the housebreaker and the car thief.

In the absence of any effective means of recovering the cost of compensation from the offender—short of an increase in prison earnings or some form of attachment of wages—it would appear that the state must, if we are to have a compensation scheme at all, bear the financial burden. One possibility might be to give offenders convicted of violent crime an adverse PAYE Code number which might be less obnoxious than the more usual form of attachment of wages; such a principle would have the merit of imposing some token responsibility on the offender while incurring comparatively little administrative expense. The important point about any scheme, however, is that relatively few persons would be involved. Violent crimes are a small proportion of the total of all crime, and greatly exaggerated by the Press and certain partisan pressure groups. The Report suggests that considerably fewer than 5,000 cases a year would be involved.

In pursuing the possibilities of an Industrial Injuries type of scheme versus a " court " scheme, the Working Party analysed 2,200 police returns on crimes of violence. Actuarial calculations showed that the cost of the first type would be approximately £845,000 and of the second £1,150,000. The costs of the Industrial Injuries type of scheme would tend to increase over the years, so that in the long run there would be little to choose between them.

In terms of the annual expenditure of the state, £1,150,000 is a trifling sum, and surely unlikely to provoke an economic crisis. (Since the Report appeared one insurance company has decided to offer a policy to police and bank officials who may suffer as a result of violent crime.) Although the Working Party could find " no constitutional or social principle on which state compensation could be justified " they were prepared to admit that there is an argument for filling the gap on considerations of sympathy for the innocent victim. To many people the social principle is clear—it is wrong that the victim should be dependent upon public charity, or have to fall back upon the parsimony of National Assistance, or even that he should bear the psychological scars of his unfortunate experience without any recompense. There will be difficulties in devising a satisfactory scheme, but efforts should be directed towards their solution, and not dissipated in argument as to whether the state has or has not the duty to compensate the victims of violent crime. Our society has come far along the road from *laissez-faire* in social policy; this reform is no revolutionary

onslaught upon legal or constitutional principle but a continuation of a trend established for more than half a century.

TERENCE MORRIS.

THE MONOPOLIES COMMISSION REPORT ON CIGARETTES AND TOBACCO [1]

I

THE report on the supply of cigarettes and tobacco describes in interesting detail the development of monopoly conditions in the U.K. cigarette and tobacco industry since 1901.[2] In that year, thirteen established U.K. firms amalgamated to form the Imperial Tobacco Company, to enable them to repel more effectively the invasion of the domestic market by the American monopoly firm, the American Tobacco Company. Within a year the "great blend" (as it was called in the trade press) occurred: Imperial and the American firm came to terms, and Ogdens, the U.K. firm previously acquired by American Tobacco, joined Imperial. Thus the dominant firm came into being. Its share of the domestic market, which was nearly 50 per cent. in 1903, rose to more than 70 per cent. by 1920, "and it has remained between 70 and 80 per cent. since then except in the period around 1930, when coupon trading was at its height, and again in the last few years when the company has lost ground to Gallaher Ltd. In 1959 Imperial's share of the trade was 63½ per cent." (para. 513). Gallaher's share of the market has grown from 11·2 per cent. in 1954 to 29·3 per cent. in 1959 (para. 261).

Gallaher is a long-established firm which did not join the Imperial amalgamation in 1901. Since 1932 it has acquired a number of other tobacco manufacturing concerns. In 1932 Imperial acquired a controlling interest in Gallaher with the purchase of 51 per cent. of its equity. Since 1946 this shareholding has been below 50 per cent., and is now 42½ per cent. "Imperial submits that the competitive position in the industry has not been and is not affected by its financial connection with Gallaher" (para. 543). The Commission thinks, however, that "as to the possible effects of the

[1] The Monopolies Commission, *Report on the Supply of Cigarettes and Tobacco and of Cigarette and Tobacco Machinery*, 1961.

Paragraph numbers in the text refer to paragraphs in this report.

Other reports of the Monopolies Commission (or of the predecessor Monopolies and Restrictive Practices Commission) are referred to simply by name of product.

[2] This article is confined to the supply of cigarettes and tobacco, although the report also considers the supply of cigarette and tobacco machinery. In this latter industry, monopoly conditions prevail by virtue of the fact that the main supplier, Molins Machine Company Limited, supplies over one-third of the reference goods, and Imperial Tobacco Company buys over one-third of the goods. The monopoly and things done by the moncpolists were found not to be against the public interest.

investment [in Gallaher] on the competitive position . . . Imperial's submissions leave a number of considerations out of account " (para. 544), and concludes that " we think it is desirable to eliminate the risk that competition between Imperial and Gallaher might be inhibited by the existence of a financial link between them " (para. 590). On the question of a possible change in the control of Gallaher if Imperial should cease to be a large minority shareholder, the Commission says: " We do not agree with Imperial that it would necessarily be contrary to the interest of the United Kingdom if competition were to be strengthened by foreign investment in a British manufacturer " (para. 546). Thus the Commission recommends that " Imperial should divest itself of any direct or indirect financial interest in Gallaher " (para. 611). This is the first occasion on which the Commission has recommended a measure of this kind. This proposal does not, however, mean the dismemberment of a going concern, since the Commission reports that there has been no organisational co-ordination of the policies of the two companies: the Commission " accept fully the evidence which both companies have submitted to the effect that Imperial does not interfere in any way in the management of Gallaher and regards itself as bound not to do so in future " (para. 542). The proposed divestiture is best seen as a safeguarding measure.

II

The Commission has obviously been much impressed by the rapid rise of Gallaher since the war; and this has indeed been remarkable. The Commission notes that Imperial's efficiency in organisation has been improved by the competition of Gallaher. Again, its profits are " not unreasonable in today's conditions. With the recent appearance of really vigorous competition in the industry and the consequent increased exposure of Imperial's operations to the market test (on the assumption that these conditions are maintained), we see no reason to think that its rates of profit in the future are likely to be excessive " (para. 540). Moreover, " in spite of the criticism we have made of particular practices [3] we do not think it can be said to be undesirable that Imperial should continue to be responsible for a high proportion of the trade so long as outside competition remains as intense as it has been in recent years. We do not find, therefore, that the conditions which prevail by reason of Imperial's share of the trade operate or may be expected to operate against the public interest " (para. 591).

The Commission was properly concerned with Imperial's dominant position and with the " welcome development " of " the competition provided by Gallaher." It reports that " we consider that a situation in which there are two very large manufacturers competing with each other is preferable to the former position where

[3] The Commission is very critical of Imperial's bonus arrangements because they place its competitors at a disadvantage; it recommends their termination.

Imperial had no competitor of comparable stature " (para. 588). The report does not, however, examine whether other situations could be devised which are even more to be preferred. And in the report there is little about the nature and implications of the new market structure which has been developing, with two large firms instead of one, and with a small number of small firms.

The report refers at various places to the intensity of competition in the industry, but there is not any systematic discussion of the nature of this competition. The report refers to the fact that the manufacturers " with few exceptions do not at present compete with one another in price for products of the same class " (para. 563), and there are other references to limited price competition and the close similarity of the prices and terms of the different suppliers. It also states that " Imperial accepts that generally, in the sense that its policy has for long influenced the decisions of other manufacturers, the company ' may be described as the acknowledged price leader in the industry ' " (para. 465). The rise of Gallaher does not seem to have changed this broad picture of an industry in which price competition has been weak or absent for many years.[4] There is no discussion whether the further growth of Gallaher is likely to change the picture in this respect. On general grounds one would not expect it to do so. In the United States there has been little price competition for long periods in a cigarette market with three major competitors. Competition in the U.K. market is described as " intense," " strenuous," or " vigorous." But it is the intense competition of oligopoly, and not the sort of competition, including price competition, which characterises markets with a large number of suppliers.

Perhaps nothing can be done which would promote price competition in the industry without entailing disproportionate costs, disadvantages or risks.[5] But should the report not be criticised because of its peripheral treatment of price behaviour in the industry as a whole and its neglect of the issue of oligopoly? These deficiencies—if they are such—are all the more notable in view of the fact that in an earlier report, that on pneumatic tyres, the Commission made a central issue of price competition in oligopoly conditions, and presented a neat, short statement of the nature of oligopolistic competition in an industry in which it is not easy for new firms to enter [6]:

" Today the industry is dominated by some half a dozen

[4] The report describes and comments on two sets of events in the 1930s, when direct or indirect price competition in the industry was contained by collective decision of the leading manufacturers; see paras. 63–65 (coupon trading) and para. 68 (cheaper empire-leaf cigarettes).

[5] This issue is discussed at some length, in the context of the industry in the U.S., in R. B. Tennant, *The American Cigarette Industry*, New Haven, 1950, and W. H. Nicholls, *Price Policies in the Cigarette Industry*, Nashville, 1951. Both the dissolution of existing firms and the special taxation of advertising expenditures are examined.

[6] *Pneumatic Tyres*, paras. 480–481.

firms—one much larger than the rest in the United Kingdom, and the others all connected with overseas interests of comparable power. They all know that any aggressive market policy on the part of one of them would provoke a response from the others which might lead to a prolonged period of ' full blooded ' competition, as they call it, either at home or abroad with disastrous effects on the profits of all. Consequently they are all under a powerful inducement to adjust their market behaviour to this situation even without any agreement to that effect. The predominance of one concern confers upon it (usually) the position of a ' price leader,' but even the price leader must be cautious in its pricing since if it started an aggressive market policy others would reply and the financial results would be unpleasant. Thus all the major firms have a powerful inducement to refrain from competition and, being few in number and fairly evenly matched in power, they can pursue this policy with a minimum of formal consultation, or with none at all. In these circumstances it seems improbable that price competition of the kind which is normal in industries where there are many independent manufacturers will develop between the manufacturers of tyres, at any rate without radical changes in the structure of the industry.

" We set out this reasoning at the outset because it underlies much of the discussion of the particular practices which follows, and in so far as it is accepted it must influence profoundly the conclusions and recommendations at which we arrive. . . ."

One may note, in passing, that the degree of concentration in the tyre industry was much lower than that in the tobacco industry: the largest firm had a smaller share of the market, and there were several other strong firms with international connections. Moreover, a study of conditions in U.S. industry suggests that the barriers to the entry of a new firm are higher for cigarettes than for tyres and tubes.[7]

III

Criticism of the report along the foregoing lines may, however, be misdirected. It may be that price behaviour in the industry as a whole and the characteristics of the oligopoly situation *per se* are subjects outside the Commission's terms of reference. Whether this is so depends upon the interpretation of relevant sections of the Monopolies and Restrictive Practices Act, 1948 (as amended). According to section 3 of the Act, in the domestic market " conditions to which this Act applies " prevail " as respects the supply of goods of any description " *inter alia* if *either* one firm supplies at least one-third " of all the goods of that description " (subs. (1)), *or* if two or more firms, which supply at least one-third of all the goods of that description, " whether by agreement or arrangement or not " (other than by an

[7] J. S. Bain, *Barriers to New Competition*, Cambridge, Mass., 1956, p. 170, Table XV.

agreement registered under Part 1 of the Restrictive Trade Practices Act, 1956), " so conduct their respective affairs as in any way to prevent or restrict competition in connection with the production or supply of goods of the description in question " (subs. (2)). Monopoly " conditions " prevail if either or both these requirements are satisfied. In a full reference—as in the cigarettes and tobacco inquiry—the Commission is called on to report whether " the [monopoly] conditions . . . prevail, and if so in what manner and to what extent," and on " the things which are done by the parties concerned as a result of, or for the purpose of preserving, those conditions," and, further, whether the " conditions in question or all or any of the things done " operate, or may be expected to operate, against the public interest (s. 6 (1)). The Commission must also consider what action, if any, " should be taken to remedy or prevent any mischiefs which result or may be expected to result from the said conditions or the said things done " (s. 7 (2)).

The question is whether, when present, the monopoly conditions (" to which this Act applies ") relate to the whole supply of the goods described in the Board of Trade's initiating reference to the Commission, or only to that part of the supply coming from that firm whose share of the total supply is sufficiently large to bring the matter within the scope of the Act (and, *mutatis mutandis*, where several firms are involved). In other words, must the Commission investigate and report only on that part of the market or industry constituted by the single-firm monopolist (or group of firms conducting their affairs in the specified way), and on " things done " by this firm (or those firms)? From the wording of sections 2 and 3, it seems that the monopoly " conditions," where present, apply to *all* the reference goods, and not only to what might be called the qualifying part of the goods. In most of its reports, the Commission, when reporting whether or not the " conditions " prevail, has used phraseology not inconsistent with this reading.[8] In the *Cigarettes* report, however, the more restricted meaning is applied: " We do not find that its share of the trade is a ground for concluding that the conditions to which the Act applies prevail as regards the supply of cigarettes and tobacco by Gallaher. We conclude that these conditions do prevail in the case of Imperial by reason of the proportion of total supplies for which that company is responsible " (para. 262; see also para. 516).[9] Support for this reading can be

[8] For particularly clear examples, see *Imported Timber*, para. 231; *Matches*, para. 174; *Electronic Valves*, paras. 345–346; *Chemical Fertilisers*, para. 363.

It is interesting that in *Matches*, para. 222, the Commission recommended a course of remedial action (official control of maximum prices) to apply to all the referred goods, and not only to the supplies from the dominant firm, whose share of the market constituted the monopoly " conditions."

[9] A similar interpretation may be found in three earlier reports: *Dental Goods*, para. 140 (but *cf.* para. 71); *Insulin*, paras. 92–93; *Buildings in Greater London*, para. 132. See also *Industrial Gases*, para. 194.

It is interesting that the terminology used in respect of cigarette machinery (in the present report) is more in accord with the other interpretation, *viz.*, that the " conditions " apply to the reference goods as a whole; see para. 342.

found in section 6 (1) of the Act, where the Commission is required, *inter alia*, to report not only on the " manner " in which, but also on the " extent " to which, the conditions prevail. The reference to " extent " would seem redundant if the " conditions " were to be regarded as co-extensive with the referred goods. Again, the reference in the same section to the " things done " by the " parties concerned " may seem to single one or several firms out of all the firms supplying the referred goods. In any event, in the *Cigarettes* report the Commission makes it clear that " we are called upon to consider whether the conditions which prevail *in the case of Imperial* . . . or all or any of the things done by Imperial as a result of or for the purpose of preserving the conditions " are against the public interest (para. 516; italics added).

Given this interpretation of the terms of reference, the oligopoly situation *per se* and the behaviour of prices in the market appear to be outside the scope of the report called for in terms of the statute. Since the investigation is then focused on a single firm, the behaviour of the industry or of the market as a whole is not directly under examination. More generally, on this interpretation oligopoly situations as such (as distinct from the dominance of a market by a single firm in an oligopoly situation) would seem to be outside the scope of investigation by the Monopolies Commission (and they are also outside the jurisdiction of the Restrictive Practices Court if there is no registrable agreement or arrangement among the oligopolists). This would seem to be the position unless the self-restraint in pricing exercised by each firm in recognition of the market situation (*vide* the *Pneumatic Tyre* report, quoted above) could be held to mean that the oligopolists " so conduct their respective affairs . . . as to prevent or restrict competition " among themselves. Then the market situation itself would constitute the monopoly " conditions," and be subject to assessment.[10] In preparing the present report, the Commission presumably did not read this meaning into the Act or did not think that it was applicable to the facts of the market situation investigated: certainly, the limited price competition is not mentioned in that part of the report in which the Commission draws its " conclusions as to the conditions defined in the Act " (paras. 260–263).

It is of interest to recall here that Mr. Harold Wilson, then President of the Board of Trade, appears to have thought that the legislation of 1948 would cover situations of price leadership with limited price competition, even where no single firm supplied one-third or more of the market [11]:

> " Subsection (2) of Clause 3 goes much further than that and covers cases where there may be no arrangement, formal or informal, between the supplying firms. This authorises the Commission to go into conditions usually referred to as " price

[10] See also note 16, below.
[11] House of Commons Debates, April 22, 1948, col. 2033.

leadership," where a single firm, without being in monopolist position, and without there being any formal cartel or price fixing association, is in a position to influence price and other conditions of supply; in such cases the price set by the leader is invariably followed, even though there may be no formal arrangement to do so."

IV

The Commission draws attention to the importance of advertising in the cigarette and tobacco market: " Public taste has become concentrated . . . on a few proprietary brands of cigarettes. Demand of this kind cannot be built up or sustained without heavy and continuing expenditure on advertising. The experience of Imperial's competitors generally over the past twenty-five years suggests that it is becoming increasingly difficult for the smaller or medium-sized manufacturer to maintain a steady level of business without quite disproportionate expenditure on brand promotion " (para. 515). One gains the impression that advertising and sales promotion provide the key to the structure of the industry and competitive behaviour in it—an impression which is confirmed by detailed analyses of the industry in the United States.[12] Yet in the report there is no systematic *discussion* of the implications of advertising in the industry.

This apparent neglect is in marked contrast to the discussion (paras. 555–556) of " direct trading," *i.e.*, the practice of manufacturers of selling direct (and not through wholesaling intermediaries) to many retailers. The Commission observes that " Imperial—and probably most of its competitors as well—regards some part of the cost incurred in maintaining accounts with retailers as a sales promotion rather than an inevitable distribution cost." It notes further: " In a fully competitive situation each manufacturer would be under compulsion to seek the right economic balance between sale to retailers and sale through wholesalers as a means of minimising his costs. In the tobacco industry competitive forces certainly affect the situation. . . . If the ' active competition ' to which Imperial refers were primarily price competition there would be little, if any, risk that direct trading with retailers could be pursued by any manufacturer to a point where it became economically unjustifiable. In the present situation in the industry, where price competition between the leading manufacturers is limited and they are prepared to spend heavily on sales promotion, there is some risk that all of them may adopt methods of selling which though well designed to increase sales are detrimental to low-cost distribution." The Commission concludes, in fact, that " in general we have no reason to think that direct sale by manufacturers to the larger retailers is inconsistent with efficient distribution." But one

[12] See *American Tobacco Co.* v. *U.S.*, 328 U.S. 781, at 797; R. B. Tennant, *op. cit.*, *passim*; W. H. Nicholls, *op. cit.*, *passim*; and J. S. Bain, *op. cit.*, Chap. 4, *passim*.

may ask why, when the Commission thought it necessary to report specifically its findings on the effects of direct trading, it did not also find it necessary to report specifically on the far more significant activity of advertising in this industry.[13] Is there no risk, to change a sentence previously quoted from the report, that, in advertising, " all of them [the manufacturers] may incur expenditures which though well designed to increase sales are detrimental to low-cost operation? " It would have been helpful if the Commission could have reported on this question.

V

In its report on pneumatic tyres, the Monopolies Commission recommended that the maintenance of *resale* prices by manufacturers, either singly or collectively, should be prohibited. This recommendation stemmed from its conclusion, noted earlier in this article, that price competition among manufacturers (*i.e.*, in the setting of their prices to the trade or to direct user-buyers) was unlikely in the prevailing oligopoly conditions: " It appears to us that in the circumstances of this industry, with which alone we are here concerned, the only way to ensure a reasonable degree of price competition in sales to the public is to abolish the maintenance of retail prices . . . ." The Commission observed, further, that in the absence of resale price maintenance, " it will be easier for larger traders . . . to bargain with manufacturers individually, and manufacturers themselves will have less incentive to make their own prices [*i.e.*, on their sales] or their suggested resale prices identical if they have no assurance of what price the trader will ultimately charge." [14] The drastic nature of this recommendation is brought out by the fact that four of the nine members of the Commission responsible for the report dissented from it. Among the reasons for their dissent, however, was their belief that the implementation of the other recommendations in the report " will prove effective to establish price competition at the manufacturers' level." [15]

In its present report, on cigarettes and tobacco, there is a fairly

[13] The Monopolies Act, 1948, ss. 6 and 7, refers, as we have seen, both to " monopoly conditions " and also to " things done by the parties concerned as a result of, or for the purpose of preserving, those conditions." In the present report, the Commission does not describe " direct trading " as a " thing done "; and there is nothing in the record to suggest that the practice has been used either because of the high degree of concentration in the industry, or in order to maintain it. Could advertising in this industry have been treated as a " thing done "?

The use in the Act of the words " for the purpose," rather than, say, " with the effect," may seem to introduce the criterion of *intent* in deciding whether a practice or activity should be reported on and assessed by the Commission. If this is so—the point does not seem to have been discussed authoritatively—it would be unfortunate. Intent is surely irrelevant where the purpose is to assess the working of industrial markets. Moreover, a non-judicial investigation is probably not the best for deciding questions of intent.

[14] *Pneumatic Tyres*, para. 497.

[15] *Ibid.*, para. 561.

long discussion of resale price maintenance (paras. 561–568), concluding that the practice does not operate against the public interest.[16] From this conclusion one member, Professor G. C. Allen, dissents in a vigorous Note (paras. 612–618). The Commission's conclusion is all the more unexpected in the light of the report on pneumatic tyres, and its own observation in the present report that " manufacturers, who with few exceptions do not at present compete with one another in price for products of the same class, might be more willing to vary their own selling prices if there were no longer any standard retail prices " (para. 563).[17] It notes, moreover, that " it may be argued that Imperial can, in effect, determine the method of retail trading for the great bulk of the supply, and that it may be considered a disadvantage from the standpoint of the public interest that opportunities for doing business on terms other than those at present imposed should be so narrowly limited, since this produces uniformity and rigidity in trading methods to the detriment of experiment and innovation in distribution " (para. 567). (Professor Allen writes that this proposition is not *arguable* but self-evident.)

The reasons for the Commission's conclusion are criticised effectively by its dissenting member. One of them is of special interest

[16] It may be noted that resale price maintenance is not treated in the report as a " thing done." With the practice, which is almost comprehensive in the industry, " each manufacturer and distributor concerned acts in such a way as to prevent price competition in the supply of any particular brand," and hence " the conditions to which subs. (2) of s. (3) of the Act applies prevail " (para. 263). And the Commission is required to pronounce on these conditions.

It may be thought that, through resale price maintenance, monopoly " conditions " prevail in respect of the supply of cigarettes by all manufacturers, and this might seem to bring the oligopoly situation as such unambiguously within the scope of the investigation (*cf.* the discussion in section III, above). The Commission, however, merely states that, because of the almost universal practice of resale price maintenance in the industry, " we have also to consider the practice of resale price maintenance in a wider context " *i.e.*, wider than that of Imperial's dominant position (para. 517). In other words, the monopoly " conditions " here are taken to be the restrictions themselves, and not to exist by virtue of the restrictions " as respects the supply of goods " referred to for report. This is a further matter on which the relevant sections of the Act are ambiguous.

[17] Professor Allen, in his Note, reinforces this point, that keen price competition in retailing might " work back to the manufacturers. If, as is probable, the latter's marketing efforts were then to be diverted from the forms of competition that raise selling costs (*e.g.*, competitive advertising) to such forms as lead to lower prices, then the public interest would be promoted " (para. 617).

The strength of this working-back of price competition is naturally difficult to predict. There is indirect evidence that cigarette manufacturers elsewhere have considered it to be significant. Thus in the U.S. in the 1930s the leading manufacturers, who have not practised resale price maintenance for many years, individually insisted that a retailer should not resell their brands at prices higher than those of competing brands (Tennant, *op. cit.*, pp. 312–314; Nicholls, *op. cit.*, p. 118); this suggests that the firm " discriminated " against might have lost some sales, and so might have been forced to adjust prices to regain them. In Canada, in the 1930s, the dominant firm took steps not only to maintain resale prices on its own brands but also on its competitors' brands. (Department of Labour, Canada: Report of Commissioner, *Investigation into an Alleged Combine in the Distribution of Tobacco Products in Alberta and elsewhere in Canada*, 1938, p. 38; see also p. 37.)

(para. 565). The question of " loss-leader selling " came up inevitably: " It is not improbable that some retailers, if free to do so, would sell some cigarettes at prices below cost for the purpose of attracting customers into their shops." The Commission does " not suggest that there is any impropriety in following this practice," but nevertheless gives two reasons why in this particular industry the (unspecified) argument based on the loss-leader practice " cannot be ignored." First, cigarettes lend themselves more than most commodities to loss-leader selling. But, if, *pace* the Commission, there is no impropriety in this practice, why should its presumed high frequency matter? Second, loss-leader selling would be concentrated on the " most popular brands," and " in practice this might well mean that Imperial in the first place, and Gallaher secondarily, would benefit at the expense of other manufacturers." But should one restraint on competitive pricing be justified because it might serve incidentally to prevent an increase in the degree of concentration in an already highly concentrated industry? In so far as the public interest can be equated with the consumer interest, the answer, I suggest, is clear: where price competition at the manufacturing stage is not likely to be significant, price competition at the distribution stage offers advantages to the consumers which would outweigh the risks associated with a slightly higher degree of concentration (the two largest firms already account for about 93 per cent. of all trade).

B. S. Yamey.

NOTES OF CASES

No Parity for Peers

This election petition [1] arose as a result of Mr. Wedgwood Benn's attempts to remain a member of the House of Commons. His father had been raised to the peerage by Letters Patent in 1942. On his father's death in November 1960, it seemed that Mr. Wedgwood Benn, who was at that time Member of Parliament for South-East Bristol, was next entitled under the patent. Nevertheless he took no steps to establish his succession and in particular made no application for a writ of summons to the House of Lords. Instead he asked the House of Commons to decide whether in these circumstances he was entitled to remain a member. The House referred this question to its Committee for Privileges. In March 1961 the Committee reported that he was not so entitled.[2] This report was adopted by the House in April and a writ issued for a by-election in South-East Bristol.

Mr. Wedgwood Benn stood as a candidate at the by-election. His opponent, Mr. St. Clair, gave formal notice to the electors that Mr. Wedgwood Benn had succeeded to his late father's peerage. Nevertheless Mr. Wedgwood Benn received the majority of votes cast and was declared elected. Mr. St. Clair thereupon brought this petition to have that declaration ruled wrong in law, and to decide that he should be seated since the votes for the respondent, Mr. Wedgwood Benn, had been given to a candidate whom the electors must have known to be unqualified and had for that reason been thrown away and were void.

Where certainty is at a premium the English system of precedent works well. And sometimes even where fact pressures from a flood of cases influence the legal rules. But where recognition of the development of the modern constitution is required, and there is a dearth of direct authority, it flounders impotently, as, in my opinion, it did here. Rarely can a dispute of such public importance have been decided on such an irrelevant basis. The dispute was clearly political but the court could only decide within some legal framework. Fortunately such a framework was furnished by the uncertainty that existed as to the exact details of the law relating to disqualification from the House of Commons. Unfortunately in settling these details the court did not consider the working of the modern constitution, and in particular the relationship between, and relative importance of, Lords and Commons. Instead it sought guidance from the closest of such few remote sources as existed.

[1] *Re Parliamentary Election for Bristol South-East* [1961] 3 W.L.R. 577, [1961] 3 All E.R. 354.
[2] H.C. 142 of 1960–61.

The court was confronted with three short legal issues. Should all peers be disqualified from the House of Commons, or only those who have chosen to establish their right to a seat in the House of Lords? If all, could the court decide whether the respondent was a peer on the evidence before it, or must it consult the Crown? If all, and it could, should it seat the petitioner, or order a fresh election? Only the first of these questions will be discussed here.[3]

The answer to it depends upon the rationale of the exclusion of peers from the Commons. This might rest upon status, as in the case of a minor or a lunatic. Or it might rest upon incompatibility of service, as in the case of a judge or a government contractor. This difference is expressed by a distinction in terminology between "peers of the realm" and "peers of parliament." The former have merely succeeded to a peerage, the latter have succeeded to a peerage and have also been summoned to attend the House of Lords. So, either term may be used correctly of those falling into the latter class. As these constitute the vast majority of peers, a regrettable looseness of terminology has resulted.[4]

This looseness, it is suggested, vitiates much of what the court describes as a "consistent stream of authority."[5] It is worth examining this stream.

Two passages from Coke are cited first.[6] But as Coke was not adverting to the present distinction, and in any event used the term "lord of parliament" in both, he can hardly be said to be in the petitioner's favour. The court does rely however, if not on Coke's own words, then on a gloss put upon them by Mr. Milner[7] in his memorandum of July 19, 1894, to the House of Commons Committee on the Vacating of Seats.[8] Coke says,[9] "he that is not of the nobility is by intendment of law among the commons." This is correct and means that until nobility is proved, a man is considered a commoner because no proof is required to be so considered. Mr. Milner says that the converse must be true, "he who by succession becomes a peer belongs to the nobility and is by intendment of law among the Lords." This begs the whole question of the proof of succession. If succession has been proved, it is clearly superfluous to make any assumption at all. The difficulty lies in deciding which status to assume in the absence of proof.

Neither Simeon,[10] nor Male[11] who follows him, adverts directly

[3] The court's answer to the second was that it could decide that the respondent was a peer on the evidence before it. To the third, that the votes cast for the respondent had been thrown away and that the petitioner should be seated in the respondent's place.

[4] See the court at [1961] 3 W.L.R. 590.

[5] *Ibid.*

[6] *Ibid.*, at p. 596. *Coke upon Littleton*, Vol. I, p. 16b. Coke's *Institutes*, Part IV at p. 1.

[7] Not Mr. Curzon, to whom the court wrongly attributes it at p. 590.

[8] *Parliamentary Papers*, 1894, Vol. 12, Appendix 6.

[9] *Coke upon Littleton*, Vol. II, p. 16b.

[10] *Elections*, 1789.

[11] *Treatise on the Law and Practice of Elections*, 1818.

to the present distinction. But since they use the expression " peers of parliament," and rest the disqualification squarely on incompatibility of parliamentary service, they seem rather more helpful to the respondent than to the petitioner.

The next authority is the Redesdale Report.[12] This includes in its definition of " peers of the realm," " such persons as, being Peers of the Realm by Right, might not have thought fit to qualify themselves to sit and vote as Lords of Parliament." Whomsoever else this class might include, it certainly includes the respondent. So this Report, which has always been recognised as the most authoritative source of peerage law, is strongly in the respondent's favour, particularly, as being the first of the sources quoted by the court to mark the present distinction.

Of the remaining pre-1894 textbooks relied upon by the court, Anson [13] and Erskine May [14] both say that " peers " are disqualified, but it is not clear that the present distinction had occurred to them. Indeed Erskine May asserts that the reason for disqualification is that " peers " have a seat in the Upper House. The respondent in this case is not entitled to sit in the House of Lords because he has not received a writ of summons.[15]

The last textbook to be cited is Halsbury.[16] The first extract [17] is ambiguous, but on either reading merely endorses the decision of the 1894 Committee.[18] The second extract cited [19] is in the respondent's favour. The court seeks to cast doubt on this passage by examination of the authority cited for it. This is the *Bedford (Borough)* case, *Marquis of Tavistock's* case.[20] There the eldest son of a living peer was to be given one of his father's lesser titles. This is done by a writ of acceleration. In this case the warrant for the writ was issued on December 11, 1832. In ignorance of this, the prospective peer voted in a parliamentary election a day or so later. Upon discovering the facts he applied to have his vote struck out. The Election Committee, after hearing argument which assumed that the position was identical for all types of succession, refused to do so. No reasons were given for the decision. It had been argued that the vote was good, either because no writ had been issued, or because the Marquis had not taken his seat. It was on account of

12 Third Report of the Lords' Committee touching the Dignity of a Peer of the Realm, 1822.
13 *Law and Custom of the Constitution*, 1886.
14 *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 1844.
15 This is established by well-settled constitutional conventions. No case has ever been discovered of a peer sitting in the House of Lords without having first received a writ of summons. No case has been discovered since Elizabethan times of a writ of summons having been issued save on application. This is referred to by the court at p. 597.
16 *Laws of England*, 3rd ed.
17 Vol. 28, section 547.
18 House of Commons Committee on the Vacating of Seats, *Parliamentary Papers*, 1894, Vol. 12.
19 Vol. 14, section 13.
20 (1833) Cockburn & Rowe 37 at 95; Perry & Knapp 112 at 143.

this doubt that the court rejected the case as authority for what they call, " the wide proposition stated in Halsbury." In fact, Halsbury has chosen the narrower of the two possible ratios in saying that until the writ is issued a vote is good. It could have cited the case for the proposition that a vote is good until the peer has actually taken his seat.

Having rejected the Bedford case, the court relies strongly on the case of *The Earl of Beauchamp* v. *Overseers of Madresfield*.[21] The court's attitude to this case is revealed in one key sentence: " We find it quite impossible to believe that judges of this eminence could *per incuriam* have stated that peers of the realm were disqualified when they meant only to say that peers of the realm who have sat in the House of Lords were so disqualified." This is surprising for several reasons. Firstly, it is uncertain that the court did say that peers of the realm and not peers of parliament were disqualified. The headnote in the *Law Reports*, the formal statement of the issue, the formal statement of the facts and the formal presentation of his decision by Bovill C.J., the senior judge, all use the expression " peer of parliament." Further, the court unanimously and without qualification approved the decision of the revising barrister to strike out the names, but the actual case stated shows that his expressed reason was that the appellants were " peers of the realm " *and* Lords of Parliament.[22] Secondly, it must be stressed that the appellants in *Beauchamp* v. *Madresfield* had not only received writs of summons, but had even taken their seats in the House of Lords, so the present distinction could not have been in the judges' minds. Brett J. even says that he only decides as he does, and in the absence of proper argument, because no contrary authority had been adduced. That may have been correct for the issue before him, but on the particular point here, the *Bedford* case would have been relevant and was not cited. It is true that in *Beauchamp* v. *Madresfield* the court relied on resolutions of the House of Commons of 1699, 1700 and 1802 which use the term " peers." But again there is no evidence that they adverted to the present distinction and there is evidence, from the incorrect references to Lords-Lieutenant and bishops, that they were drafted by laymen ignorant of the law.

Finally, in the *Rhondda* case,[23] Lord Birkenhead introduced his discussion of these resolutions of the House of Commons by saying: " It is material to consider how in past ages the House of Commons looked upon the relation of a peer of Parliament towards that House."

It is submitted that these authorities are inconsistent and inconclusive, and that they carry no weight in the face of the anomalies to which this decision gives rise. These stem predominantly from

[21] (1872) L.R. 8 C.P. 245.
[22] (1872) 27 L.T. 606 at 607.
[23] *Viscountess Rhondda's Claim* [1922] 2 A.C. 339 at 367.

the double standard now involved. The House of Commons can apparently disqualify in a case it considers notorious, but the House of Lords has to wait for the evidence to be examined before it can qualify. This leads to anomalies both between different aspects of one individual's position, and between different individuals. Those of the first class were exposed by Mr. Balfour in a question to Sir R. F. D. Palgrave before the 1894 Committee [24]: "So that, on your view, this Peer who has not yet been summoned to the House of Lords, is represented in the House of Lords, is not represented in the House of Commons, is incapable of being represented in the House of Commons, because he has not got a vote for a Member of the House of Commons, and is incapable of having a vote for a Member of the House of Commons; but, nevertheless, he fills a seat, although he does not occupy it, in the House of Commons." The answer was, and is, yes.

As between individuals, anomalies arise because notoriety is an uncertain basis for a legal rule, and an unjust one. One has only to compare the attitude of Lord Normand in the Dudhope peerage claim [25] with the court's here. In that case preparation was complete in 1937, but no claim was made then because the claimant wished to remain in the House of Commons. Lord Normand, speaking for a unanimous Committee of Privileges, said [26]: "After 1937 there was some further delay for reasons personal to the Petitioner, though they were prompted by considerations of the public interest." The respondent here had exactly the same consideration in mind but the court said [27]: "By the fact of succession he has entered a particular class of persons upon whom the duty of attending the House of Lords (unless granted leave of absence) is imposed by law and immemorial usage; and no modern constitutional convention has in our view been established." Yet the Earl of Dundee was also in this class and the only difference between him and the respondent here is that he was not so widely believed to be a peer.

The whole question of duties under the modern constitution is glossed over in the court's judgment. Here a study of recent statutes and current practices [28] which have drastically altered the relationship of Lords and Commons would have been rewarding. This the court refused to make, relying instead on inferences from old books and long forgotten cases where the points of contention here were neither considered nor relevant.

The court's answer to the respondent's argument that it was incompatibility of service that disqualified was that this was to "confuse the reasons for the rule coming into effect with the rule

[24] House of Commons Committee on the Vacating of Seats, *Parliamentary Papers*, 1894, Vol. 12 at p. 29, qu. 350.
[25] H.L. 129 of 1951–52.
[26] p. 131.
[27] [1961] 3 W.L.R. at 599.
[28] *e.g.*, House of Lords Standing Order 21, as amended, dealing with leave of absence; Parliament Act, 1949; Life Peerages Act, 1958.

itself." [29] Perhaps if courts from whom there is no appeal did this more often there would be fewer unreasonable rules.

Colin Tapper.

The Transformer Agreement

In a report dated July 1956, the Monopolies and Restrictive Practices Commission reported on monopoly conditions in the supply and export of certain electrical machinery and plant.[1] The third category of product included in its terms of reference was " transformers of not less than 5 KVA rated output." The Commission reached the conclusion that the restrictive pricing arrangements (and associated practices) affecting supplies to the home and export markets operated or might be expected to operate against the public interest. No government action was taken on this report. By this time new arrangements for dealing with restrictive agreements had been introduced in Part I of the Restrictive Trade Practices Act, 1956.

Just under five years later, restrictive pricing arrangements in the supply of transformers to the U.K. market have been judged by the Restrictive Practices Court to be contrary to the public interest " by force of the Act of 1956." [2] The principal restriction was embodied in an agreement " not to tender except at a minimum price, which itself is based on the average of the three lowest costings tabled by the parties, plus a percentage of profit considered by the association [The Associated Transformer Manufacturers] to be appropriate, less common discounts and selling factors." [3] The pricing arrangements were much the same as those examined by the Monopolies Commission, and broadly the same group of firms were concerned in the two inquiries.[4] (A separate exports agreement was not before the court, being outside its jurisdiction. However, the general effects of this agreement were considered, because the continuance of this agreement was said to be dependent on the continuance of the agreement in the home market.) Thus similar arrangements were found to be against the public interest by the two different assessing bodies,[5] following different procedures, and

[29] pp. 597, 370.

[1] Monopolies and Restrictive Practices Commission, *Report on the Supply and Exports of Electrical and Allied Machinery and Plant*, 1957. Henceforth referred to as *Mon. Com. Report.*

[2] *Re Associated Transformer Manufacturers' Agreement* (1961) L.R. 2 R.P. 295.

[3] *Ibid.* at p. 300.

[4] The Monopolies Commission reported their view that no modification of the pricing arrangements, " as long as common prices are retained," could " overcome the principal objections to the existing arrangements which have led us to the conclusion that they are against the public interest " (*Mon. Com. Report*, para. 793).

[5] It is of interest that one member of the group of the Commission responsible for the report was also a member of the Restrictive Practices Court which gave the present judgment.

applying different statutory criteria for judging the public interest.[6] It may be noted that there were some major changes in the circumstances of the industry in the period between the two investigations: profit margins were higher in the years examined in the earlier inquiry; moreover, they were roughly the same on home and export business in the earlier period, whereas in the later period they were much higher in the home than in the export market.[7]

The association argued, in terms of section 21 (1) (*b*) of the Act, that its arrangements were in the public interest because they were of substantial and specific benefit to users of transformers. The court said that " it would be possible, at the cost, to those who hear or read this judgment, of great length, to include in it a detailed analysis of the evidence which has been given on this question." It did not do this: " . . . we do not consider that such a course would serve any useful purpose." [8] But more detailed discussion of the evidence and of the court's grounds for rejecting the contentions of the association would have been interesting. The occasional passing references to pieces of evidence whet the appetite for more; and it would be informative and instructive to see, as it were, the mind of the court at work.

The court did not accept that a prima facie case had been made out, and added that it refrained from expressing a view whether the case—mainly that the price agreement promoted research and development in the industry and maintained the standard of quality —would have qualified under the heading of " specific " (*i.e.*, whether more research and development, for example, would have constituted a " specific " benefit or advantage for users). One feels that the court would not have disagreed with the following passage in the report of the Monopolies Commission: ". . . the manufacturers appear to us to over-estimate the likelihood of a protracted weak market, to take a mistaken view of some of its effects if it should occur . . . and to under-estimate the buyer's interest in the quality of his purchase." [9]

The association also claimed, in terms of section 21 (1) (*f*), that the termination of its pricing arrangements would involve a substantial reduction in export earnings, and put forward a number of ways in which this would occur. These arguments were found

[6] It may be noted, in passing, that the Restrictive Practices Court has found a common price agreement in the linoleum industry to be against the public interest, whereas the Monopolies Commission previously had found an agreement of this kind in this industry not to be against the public interest provided certain modifications were introduced. These modifications were in fact introduced in the agreement which subsequently came before the court. See *Re Linoleum Manufacturers' Association's Agreement* L.R. 2 R.P. 395; Monopolies and Restrictive Practices Commission, *Report on the Supply of Linoleum*, 1956, esp. paras. 198–207.

[7] *Mon. Com. Report*, para. 636; L.R. 2 R.P. 295, at pp. 302–303.

[8] *Ibid.* at pp. 337–338.

[9] *Mon. Com. Report*, para. 757.

unacceptable. The court did not accept that there would be any such decline in research and development activities and quality standards as to have a significant adverse effect on export earnings; it did not accept that lower prices and profits in the home market would make the firms less inclined to go after export business; and it did not consider that worthwhile collaboration in export business would suffer. It also made the point that the export agreement itself, which the association argued would not survive a restoration of price competition in the home market, had the effect of tending " to prevent the keenest price being quoted out of the United Kingdom." This, and the general dislike by purchasers of level tendering, led the court to say: " Whatever may have been the situation in the past, a system involving a restrictive practice such as this must, in our view, have, if anything, a tendency to decrease export earnings, in the situation of competition which now exists and will continue in the export market." [10]

A final claim made by the association was that the pricing arrangements for the sale of a particular category of very large transformers were " reasonably necessary " to enable the suppliers to negotiate " fair terms " with the preponderant buyer, the Central Electricity Generating Board. The court found that this case, under paragraph (*d*) of section 21 (1) of the Act, failed: the pricing arrangements were not necessary to ensure that efficient manufacturers could secure a reasonable, but no more than a reasonable, profit on sales of these transformers to the preponderant buyer. The court accepted for the purpose of its decision the definition of " fair terms " enunciated in *Re Water-Tube Boilermakers' Agreement*.[11]

While parts of the judgment are of interest in so far as they concern the economics of the restrictive arrangements in the industry—the discussion of their effects on exports may be compared

[10] L.R. 2 R.P. 295 at p. 341.
It is not clear from the law report whether it was argued for the association that in some cases the export agreement raised export earnings by raising the price charged to the foreign buyer. It probably was not so argued, for it was said on behalf of the association that the level of prices in the export market was not higher than it would otherwise have been (at p. 310). The court reached a different conclusion (see text, above). In its submissions to the Monopolies Commission, the industry—in that inquiry it was a wider sector of the electrical plant industry—did argue that " since one Group member does not undercut another in price, the foreign buyer placing a contract with a United Kingdom manufacturer in some cases pays a higher price than he would have done in the absence of common price arrangements " (*Mon. Com. Report*, para. 705). This was among the reasons why one member of the Commission was not prepared to say that the common price system was against the public interest in relation to exports: ". . . the public interest requires that the greatest benefits should accrue and continue from export orders. . . . The prices and terms, that might be acceptable to a certain manufacturer at a certain time, might represent a needless sacrifice of the public interest " (*Mon. Com. Report*, para. 839).

[11] L.R. 1 R.P. 285 at p. 341.

with the discussion of similar matters in the *Water-Tube Boilermakers* case [12]—the lasting interest of the judgment lies in its interpretation of several aspects of the public interest section of the Act of 1956. Four points were considered.

The first point concerns the use of the word " restriction " in the various paragraphs of section 21 (1). In *Re Blanket Manufacturers' Agreement*, the court held that each of a series of restrictions had to be assessed separately.[13] In the present case the association had forty-two restrictions (affecting different categories of goods sold to different classes of buyer). The association sought to justify the forty-two price restrictions collectively under sections 21 (1) (*b*) and (*f*), while confining itself to one particular price restriction (on the sale of large transformers to the C.E.G.B.) in its claim under section 21 (1) (*d*). The court held that the grouping of the restrictions was permissible, partly on the ground that, unlike in the *Blanket* case, all the restrictions stemmed from a single agreement, and partly on the ground that, in terms of the Interpretation Act, 1889, the references in section 21 to " restriction " in the singular extend to restrictions in the plural. At the same time it held that the grouping of restrictions for collective justification under one paragraph did not preclude the successful defence of any single severable restriction under another paragraph of section 21 (1). The court explained that whereas single restrictions might fail under section 21 (1) (*b*), their cumulative effect might satisfy the court. And on the other hand, to rule out the successful defence of a single restriction because the defence of collective restrictions had failed could lead to the unhelpful result that an unsuccessful association could have a new agreement confined to the single restriction, involving a fresh reference to the court.

There can be no doubt that the court's ruling is appropriate. The purpose of the legislation is to remove undesirable restrictions without removing desirable restrictions. One hopes that it follows that the court, in its turn, can make use of " fragmentation," so that where a number of restrictions are defended as a group, the court can at its discretion find that some constituent parts are in the public interest, and others not, and declare accordingly. Even where the court may find that a group of restrictions as a whole is more conducive to the public interest than no restrictions at all, the continuance of a selection of the restrictions may be the optimal solution, minimising the detriments to, and maximising the promotion of, the public interest.[14]

The next point of interpretation refers to the exports paragraph —the exports justification—of section 21 (1), the relevant part of which runs: " . . . the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business

[12] L.R. 1 R.P. 285 at pp. 342–345. See also (1960) 23 M.L.R. 85–87.
[13] L.R. 1 R.P. 208 at p. 255.
[14] See (1960) 23 M.L.R. 88.

which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the . . . trade or industry." The court rightly observed that the paragraph " is not easy to construe in all its parts on any basis." The issue before the court here was the meaning to be attached to the word " earnings." For the association it was contended that the word " volume " in the paragraph could not mean physical volume, " since there is no public interest in increasing the physical bulk of transformers exported without regard to the price at which they are sold "; " volume " therefore must mean turnover (sales) measured in money. Hence " earnings," a word used as an alternative to " volume," could not mean the same thing, that is, turnover measured in money, but must mean " net earnings " or " profits." [15] The court rejected this construction: in its view, " the phrase ' volume or earnings ' is either a reference to the same thing—that is, turnover—or else volume is an alternative yardstick by weight, yardage, gallonage, and so forth, whenever the business of the particular trade or industry is appropriate to such a yardstick." Two of the reasons given for the rejection of the association's interpretation are of interest. First, since it was impossible to inquire into the net profits of all exporters (of all goods) from the U.K., one of the two bench-marks against which to measure the postulated reduction in the export " earnings " of a particular industry would be inapplicable. (The court noted that the same criticism could apply to the interpretation of " volume " as physical volume.) Second, " earnings " means " turnover "— " that is what concerns the public interest in relation to the export trade, and not the rate of profit earned by individual exporters." [16]

It is not obvious, however, why the gross earnings (proceeds) of export sales should be the crucial quantity. Just as there is no economic merit in increasing the physical volume of exports regardless of price or cost, so there is none in increasing the gross earnings of exports regardless of their cost. Exports are not costless; and the value of exports to the national economy cannot be assessed without taking account of the costs involved, in terms of the value of the imported and domestic materials, labour and capital used. A calculation of the benefit to the economy of particular export business requires some deduction from sales proceeds to reflect the value of the inputs. Specification of the deduction, and its calculation in a particular case, involve serious difficulties. (Thus there has been considerable controversy about the real value of British agriculture in relation to the balance-of-payments problem.) But it is clear that the *gross* proceeds of export business exaggerate the benefit of that business as seen from the national (or even the balance-of-payments) point of view, except in some sense in the special case (not applicable now) where the resources in question

[15] L.R. 2 R.P. 295 at p. 328.
[16] *Ibid.* at pp. 333–334.

would have been unemployed if the export business had not taken place—the situation of the export of unemployment. In fact, paragraph (*f*) of section 21 (1), on any reasonable reading, makes little sense in economics.[17]

The two remaining points of interpretation relate to paragraph (*d*) of section 21 (1)—where a restriction is necessary to secure " fair terms " in dealings with a preponderant customer. The discussion of this paragraph in the *Water-Tube Boilermakers* case seemed to leave open the possibility that it might be held to apply even where the supplying industry was not able to secure " fair terms " in its dealings with other, non-preponderant customers (*e.g.*, because of generally weak market conditions).[18] Though this point did not arise in the present case, and though the court for its purposes accepted the earlier judicial definition of " fair terms," the court said:

> " It may be that the definition is not of universal application. In any particular market it might be that, without any restrictions, prices generally would be, perhaps for a period, below the defined level of fair terms, and that, with a particular restriction aimed at the preponderant buyer alone, prices to other purchasers would remain below the defined level. We are by no means sure that a restriction, which would result in the preponderant buyer paying more than other buyers, could be justified under the paragraph, even though it would result in the preponderant buyer paying only no more than would give to an efficient manufacturer a reasonable profit. It may be that the paragraph is limited to such a restriction as would prevent the preponderant buyer obtaining more favourable or more unfair terms than the generality of buyers: and this view might be supported either by regarding the word " fair " in the section as not absolute but relative to the market generally, or by regarding the words " reasonable profit " in the judicial definition as relative to the level of profit obtainable from other purchasers." [19]

This suggested refinement of the definition is wholly commendable, and, one imagines, in line with legislative intentions. If it is applied in this way, paragraph (*d*), designed to protect sellers against a preponderant buyer, will not sanction arrangements which discriminate against such a buyer.

Paragraph (*d*) refers to the buyer who " controls a preponderant part of the market "; this raises the question of the limits of the

[17] In the *Linoleum* case (L.R. 2 R.P. 395 at p. 426) the court rejected the suggestion that the relevant magnitude was the " net export content " of exports, presumably the gross proceeds *less* the value of the imported raw materials embodied in the exports.

In the same case, at p. 417, it was argued for the association that " 'earnings ' is a sufficiently wide word to refer to the balance of payments, and if the net result of an agreement is a substantial saving of foreign revenue because of the avoidance of imports, that is a relevant matter under paragraph (f) . . .". The judgment does not refer to this argument.

[18] See (1960) 23 M.L.R. 84.

[19] L.R. 2 R.P. 295, at pp. 344–345.

relevant " market." For the Registrar it was argued that " market " means " the entire market, so that if there is a world market, that must be taken into account." [20] This interpretation was rejected by the court, which preferred to follow the views of the court in the *Water-Tube Boilermakers* case.[21] Reference was also made to the difficulty of measuring total world demand. There is, however, point in the Registrar's contention: the effective pressure on sellers (whether emanating from competition among themselves or from the bargaining activities of the buyer) to make concessions to the preponderant buyer depends largely on the sellers' access to other business, at home or abroad. A sole buyer in the home market has power to wring " unfair " concessions from the sellers only to the extent that they are handicapped (by transport costs, tariffs or other constraints) in selling in foreign markets. (A related point has exercised United States courts, which have had to take account of the availability to buyers of substitute products for monopolised products.) However, the point at issue loses most of its practical significance if the judicial definition of " fair terms " is modified in the way indicated by the court in the present judgment (see preceding paragraph). It will not matter how narrowly the " market " is defined for the purpose of deciding whether a buyer is preponderant so long as account is taken of sales outside that market when deciding on the " fairness " of prices and terms in dealings with him.

B. S. Yamey.

" Lolita ": Banned in New Zealand

In *Re Lolita*,[1] the New Zealand Court of Appeal (North and Cleary JJ., Gresson P. dissenting) upheld the decision of Hutchison J.[2] and decided that the much-discussed novel *Lolita* offended against the provisions of the Indecent Publications Act, 1910, as amended by the Indecent Publications Amendment Act, 1954.

Inasmuch as the court was primarily concerned to determine whether the book offended against New Zealand law, without any necessary consideration of the law of other countries in which the book has been freely sold, it is important that the relevant statutory provisions be set out.

The relevant sections of the Act of 1910, as amended, are as follows:

> " Section 5 (1). In determining whether any document or other matter is indecent within the meaning of this Act the Magistrate shall take into consideration—

20 *Ibid.* at p. 316.
21 *Ibid* at p. 334.
1 [1961] N.Z.L.R. 542.
2 [1960] N.Z.L.R. 871.

(*a*) the nature of the document or matter;

(*b*) the nature and circumstances of the act done by the defendant with respect thereto, and the purpose for which the act was done;

(*c*) the literary or artistic merit or medical, legal, political, or scientific character or importance of the document or matter;

(*d*) the persons, classes of persons, or age groups to or amongst whom the document or matter was or was intended or was likely to be published, distributed, sold, exhibited, given, sent, or delivered; and the tendency of the matter or thing to deprave or corrupt any such persons, class of persons, or age group (notwithstanding that persons in other classes or age groups may not be similarly affected thereby).

(2) No document or matter shall be held to be indecent unless, having regard to the aforesaid and all other relevant considerations, the Magistrate is of opinion that the act of the defendant was of an immoral or mischievous tendency.

Section 6. Subject to the provisions of the last preceding section, any document or matter which . . . unduly emphasises matters of sex, horror, crime, cruelty, or violence, shall be deemed to be indecent within the meaning of this Act."

While both these sections were the subject of much discussion by all the members of the court, the crucial question for determination was whether the novel " unduly emphasised matters of sex." North and Cleary JJ. held that it did so, Gresson P. held that it did not.

North J. gave a comprehensive review of the relevant Australian authorities and gave it as his opinion that the meaning attributed in those cases to the words " unduly emphasising matters of sex " should be adopted in New Zealand, both because he thought that it was desirable that there should be uniformity between Australia and New Zealand in a matter of this kind and because he found it difficult to suggest a more satisfactory method of approach.

The first of the decisions discussed by North J. is *Wavish* v. *Associated Newspapers Ltd.*[3] In that case Martin J. held that " unduly emphasising matters of sex " should be construed as dealing with matters of sex in a manner which offends against the standards of the community in which the article is published. This " standards of the community " test was applied in *MacKay* v. *Gordon & Gotch (Australasia) Ltd.*[4] and *Kyte-Powell* v. *Heinemann, Ltd.*[5]

North J. then gave a detailed consideration to the book itself, quoting several extracts from it and said: " Having given the matter, I hope, full consideration and having guarded myself against

3 [1959] V.R. 57—a case decided in 1956 but not reported until three years later.
4 [1959] V.R. 420.
5 [1960] V.R. 425.

any tendency to adopt a puritanical or narrow attitude, I have reached the clear conclusion that the author did succeed in writing a very subtle but nevertheless a very lewd book, in which an abnormal sexual relationship is the all-absorbing subject, and its treatment, in my opinion, does offend the standards which we are entitled to expect in this community whatever the position may be in other countries."

Cleary J. agreed that the " standards of the community " test should be applied, even though it was lacking in precision. He was of the opinion, however, that under the New Zealand Act it must be found both that the publication unduly emphasises matters of sex and that it has a tendency to corrupt and deprave. But he added that when he came to apply the statutory provisions to such a case as the one before the court, he could see little real distinction between the two topics of undue emphasis on matters of sex and a tendency to deprave and corrupt. He said: " If the emphasis is to become undue when it infringes the standards of the community as to the bounds of decency on this topic, then, so it appears to me, those standards themselves have been formed and conditioned in large measure by what the community regards as likely to be harmful to its members, and especially to its young and adolescent members. . . . In the result then, I think that the two factors of undue emphasis on matters of sex and a tendency to deprave or corrupt largely merge into and coalesce with one another."

Dealing with the literary or artistic merit of the book—a question which had to be considered under section 5 of the Act, Cleary J. said that the court was concerned with a contemporary novel which had already aroused controversy in other countries. To such a book rather different considerations applied than to works which had already received general recognition as classics or as possessing high literary quality. Those works had already received acceptance by the community as part of its literary heritage, and because they had been so accepted it could not be said that they infringed the prevailing standards of the community as to decency. With a contemporary work the court was obliged to endeavour to make an assessment of the merits of the work as a piece of literature so that it could say whether its general distinction would result in an appeal to those likely to read it seriously for the purpose of appreciating its literary worth, or whether its appeal to readers would rest on any salacious content of the book. In his opinion, *Lolita* was not saved from being indecent by reason of its literary merit.

Gresson P. dissented. His only reference to the Australian decisions on which the majority relied was as follows: " I am not unaware that some Australian judges have held that ' unduly emphasising matters of sex ' should be construed as dealing with matters of sex in a manner which offends against the standards of the community in which the book or article is published. I find it difficult to adopt so very free an interpretation. That is not what

the legislature has said and it is surely a primary principle of construction that plain words must be given their plain meaning. This I have tried to do. Moreover I should find myself in some difficulty if I adopted the ' standard of the community ' test for I just don't know what the standard of the community is, nor how to ascertain it. . . . Accordingly I prefer to adopt the plain language of the statute and to exercise my own judgment as to whether the book ' unduly emphasises matters of sex.'. . . I do not think the book in question does."

He said that it might well be that a narrative which unnecessarily devoted overmuch attention to sexual episodes might be condemned as unduly emphasising matters of sex. But it was otherwise when the work was itself a study of a particular aspect of sex. He did not think the book could be said " unduly " to emphasise matters of sex any more than a book which was a study of the game of cricket, in the form of a novel, could be said " unduly " to emphasise cricket.

Nor did he agree with Hutchison J. that the book was " aphrodisiac," that it should be condemned because of " a likelihood of introducing lustful thoughts and exciting sexual impulses to a point at which normal restraints might fail." He found the book so boring and tedious that nothing but the necessity of judging it would have induced him to read it to the end.

To say, as the majority of the court said, that " unduly emphasising matters of sex " means " dealing with matters of sex in a manner which offends against the standards of the community in which the article is published " is an outstanding piece of judicial legislation. The phrase appears to have first been used by Fullagar J. in *R.* v. *Close*.[6] This was an appeal to the Full Court of the Supreme Court of Victoria against a conviction on indictment for publishing an obscene libel. In the course of a lengthy judgment Fullagar J. said [7]: " There does exist in any community at all times —however the standard may vary from time to time—a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that today there is any better tribunal than a jury to draw it. . . . I am very far from attempting to lay down a model direction, but a judge might perhaps, in the case of a novel, say something like this: ' It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere. . . . There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards.' "

[6] [1948] V.L.R. 445.

[7] At p. 465.

Of *R.* v. *Close* a contemporary commentator in the *Australian Law Journal* [8] said: " The case is of great interest from the literary point of view but its legal importance is slight." The subsequent history of the matter hardly justifies the latter remark.

Fullagar J.'s statement does not appear to have been the subject of judicial comment until September 1956. In *Wavish* v. *Associated Newspapers Ltd.*[9] Martin J. was hearing an appeal against conviction under section 169 (1) of the Police Offences Act, 1928 (Vict.), which provided, *inter alia*, that " obscene " should include " unduly emphasising matters of sex, crimes of violence, gross cruelty or horror." In the course of his judgment he said [10]: " Although the first enactment which defined obscene as, *inter alia*, ' unduly emphasising matters of sex,' preceded the case of *R.* v. *Close* [11] by ten years, there is matter in the judgment of Fullagar J. in that case, which is helpful in construing the word ' unduly.' The learned judge was dealing with the common law offence of obscene libel and pointed out that the decency or indecency of an article cannot depend on the nature of the subject-matter treated but the question was one of the manner of handling that subject-matter." He then quoted the suggested direction to the jury which is set out above and continued: " Although not directed to the definition of obscene in the Police Offences Acts, I think that passage is applicable to such and that ' unduly emphasising matters of sex ' should be construed as dealing with matters of sex in a manner which offends against the standards of the community." Later he said [12]: " He [the magistrate] should have asked himself whether [the article] dealt with sexual matters in a manner which offends against the standards of the community."

Thus what was stated by Fullagar J. as being " far from an attempt to lay down a model direction to a jury " in the trial of an indictment for the common law crime of obscene libel was used by Martin J. as a definition of a phrase in a statute dealing with indecent publications.

The defendant applied to the High Court of Australia for special leave to appeal.[13] The application was dismissed in a short oral judgment delivered by Dixon C.J. No mention was made of Martin J.'s test to determine the meaning of " unduly emphasising matters of sex." This prompted North J. to say, in the instant case [14]: " It is further to be noticed that the High Court did not think it necessary to dissent from the view expressed by Martin J. as to the meaning to be given to the words ' unduly emphasising

[8] (1949) 23 A.L.J. 18.
[9] This case, as mentioned above, was decided in that month but not reported until three years later; [1959] V.R. 57.
[10] At p. 62.
[11] [1948] V.L.R. 445.
[12] At p. 63.
[13] *Associated Newspapers Ltd.* v. *Wavish* (1956) 96 C.L.R. 526.
[14] At p. 557.

matters of sex.' " The implication of North J.'s remark is that the High Court approved of the views of Martin J. But it is doubtful whether that is so. For the purpose of the High Court's decision, no reference to that phrase was necessary.

Be that as it may, the High Court of Australia in *Transport Publishing Co. Pty. Ltd.* v. *The Literature Board of Review* [15] did not find it necessary to advert to the views of Martin J. in *Wavish's* case.[16] This was an appeal from the Supreme Court of Queensland which had upheld the prohibition of the Literature Board of Review against the distribution of certain literature alleged to be obscene. The High Court (by a majority) allowed the appeal. The relevant words in the Queensland statute are: " Unduly emphasises matters of sex, horror, crime, cruelty, or violence." The only reference to these words is in the judgment of the majority of the court who said [17]: " This [the article concerned] does not appear to us to be within the range of any reasonable application of what is meant, in the definition of ' objectionable,' by the phrases ' unduly emphasises matters of sex ' and ' likely to be injurious to morality.' The connotation of these phrases is not very definite and any attempt to give them greater definition than the legislature has chosen to do would be hazardous."

Despite this statement by the High Court, the " standards of the community test " was adopted by Sholl J. in *MacKay* v. *Gordon & Gotch (Australasia) Ltd.*[18]—an appeal against conviction under the Police Offences Act, 1957. He said [19]: " I accept for the purposes of my judgment the view of Martin J. in *Wavish's* case, that ' unduly emphasising matters of sex ' means dealing with them in a manner which offends against the standards of the community in which the article is published, distributed, etc. It is for the court to ascertain those standards for itself."

Earlier in his judgment [20] the learned judge had said: " I have formed my own opinion on the question of obscenity, bearing in mind . . . the explanation of the phrase ' unduly emphasises matters of sex ' given by the High Court in the *Transport Publishing Co.'s* case.[21] With respect, it is pointed out that the only reference the High Court made to this phrase as a phrase to be interpreted, was in the words quoted above and this, it is submitted, is hardly an explanation. Certainly the High Court did, in a lengthy passage, give reasons why the particular publications in question might be said unduly to emphasise matters of sex, but that hardly explained the phrase.

15 Decided in November 1956 (1956) 99 C.L.R. 111.
16 *Supra.*
17 At p. 117.
18 [1959] V.R. 420.
19 At p. 426.
20 At p. 425.
21 [1958] A.L.R. 177 at p. 180.

Finally, in *Kyte-Powell* v. *Heinemann Ltd.*[22] Pape J. purported to adopt the same test. He said [23]: " In *Wavish* v. *Associated Newspapers Ltd.*[24] Martin J. considered that ' unduly emphasising matters of sex ' should be construed as ' dealing with matters of sex in a manner which offends against the standards of the community in which the article is published ' and in *MacKay* v. *Gordon & Gotch (Australasia) Ltd.*[25] Sholl J.[26] adopted that test and added ' It is for the court to ascertain those standards for itself. . . .' It is my duty as a judge of first instance to apply the test so laid down, but I cannot but feel that a court may not in every case give full weight to the word ' unduly '—which according to the *Shorter Oxford Dictionary*, means ' to excess '—beyond the due degree! It is, perhaps, inherent in the construction so adopted that one of the reasons for holding that a publication ' offends against the standards of the community ' may well be that matters of sex are dealt with to excess."

With respect, the learned judge would appear to be arguing in a circle. His statement may, however, be interpreted as meaning that to determine the meaning of the phrase " unduly emphasises matters of sex " a judge should have resort to the dictionary and not to the nebulous " standards of the community " test.

The ultimate consequence is that a statement which a judge said might be a proper direction to a jury has been elevated to a statement of legal principle and has been confirmed in that status by the majority of the New Zealand Court of Appeal. It is not suggested that if North and Cleary JJ. had gone to the dictionary to determine the meaning of the disputed phrase their decision would have been any different. But at least such an approach would have emphasised the fact that matters of law—and whether a publication is indecent within the meaning of the Act is a matter of law—are for the courts and not for the community.

A. G. Davis.

Decrees Nisi and Nuptiality

Two recent cases illuminate that curious legal twilight between decree nisi and decree absolute in divorce.

In *Cook* v. *Cook* [1] the short question was whether the Divorce Court had jurisdiction after decree nisi but before decree absolute to grant the wife an injunction ordering the husband to leave the matrimonial home forthwith and restraining him from molesting or interfering with her. The wife obtained a decree nisi in November

[22] [1960] V.R. 425.
[23] At p. 432.
[24] [1959] V.R. 57 at p. 62.
[25] [1959] V.R. 420.
[26] At p. 426.
[1] [1961] 2 All E.R. 791. Also reported at [1961] 3 W.L.R. 432.

1960 on the ground of cruelty but had delayed having it made absolute because she claimed that a post-nuptial settlement existed in respect of the home and wished this claim to be adjudicated upon before decree absolute. Although the conveyance of the home had been taken in the husband's name, she alleged that she had contributed £250 and he £150 towards its purchase and that it had been agreed to effect the purchase in their joint names. Accordingly, in January 1960 she had given notice seeking a variation of this alleged post-nuptial settlement so as to be allowed to remain in the matrimonial home with her children, but there had been no adjudication upon this issue at the time of the decree nisi nor subsequently.

In March 1961 the present proceedings for an injunction came before Lloyd-Jones J., who had pronounced the decree nisi the previous November. Both spouses were still residing in the house, as they had been doing since the original petition for divorce was filed in June 1959. Before the divorce suit was heard, the husband, on the wife's application, had given two separate undertakings not to molest or make advances to the wife pending the hearing. After the decree nisi he had committed clear breaches of these undertakings by repeated assaults and abuse of his wife.

For the husband it was argued that the court had no jurisdiction to grant an injunction in the form asked. His counsel submitted that once a decree nisi had been propounded the parties became strangers and all that remained, in effect, was the administrative act of granting the decree absolute. Although the interval afforded opportunities for interventions by the Queen's Proctor and others, in counsel's submission there was really no suit in being on which the court could found jurisdiction.

For her part counsel for the wife relied upon *Rayden on Divorce*, 8th ed. at p. 495, para. 35, where, under the heading " Molestation," it is stated:

> " When a matrimonial suit is pending (but not after final decree or after the petition has been dismissed) the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation."

Counsel argued that a decree nisi is not a " final decree," so that the court had jurisdiction to give the wife the relief sought. She distinguished *Smith* v. *Smith* [2] where the decree was one of judicial separation and Butt J. said [3] " the parties are now strangers to each other and I have no jurisdiction over them. The proper person for Mr. Smith to apply to is a police magistrate." The present case, as counsel emphasised, concerned a decree nisi of divorce, not a decree of judicial separation.

Lloyd-Jones J. was persuaded by this argument. Finding support in the remarks of Pearce J. (as he then was) in *Silverstone* v. *Silverstone* [4] where a husband was restrained from entering the

[2] (1889) 59 L.J.P. 15.
[3] At p. 16.
[4] [1953] 1 All E.R. 556; [1953] P. 174.

Finally, in *Kyte-Powell* v. *Heinemann Ltd.*[22] Pape J. purported to adopt the same test. He said [23]: " In *Wavish* v. *Associated Newspapers Ltd.*[24] Martin J. considered that ' unduly emphasising matters of sex ' should be construed as ' dealing with matters of sex in a manner which offends against the standards of the community in which the article is published ' and in *MacKay* v. *Gordon & Gotch (Australasia) Ltd.*[25] Sholl J.[26] adopted that test and added ' It is for the court to ascertain those standards for itself. . . .' It is my duty as a judge of first instance to apply the test so laid down, but I cannot but feel that a court may not in every case give full weight to the word ' unduly '—which according to the *Shorter Oxford Dictionary*, means ' to excess '—beyond the due degree ! It is, perhaps, inherent in the construction so adopted that one of the reasons for holding that a publication ' offends against the standards of the community ' may well be that matters of sex are dealt with to excess."

With respect, the learned judge would appear to be arguing in a circle. His statement may, however, be interpreted as meaning that to determine the meaning of the phrase " unduly emphasises matters of sex " a judge should have resort to the dictionary and not to the nebulous " standards of the community " test.

The ultimate consequence is that a statement which a judge said might be a proper direction to a jury has been elevated to a statement of legal principle and has been confirmed in that status by the majority of the New Zealand Court of Appeal. It is not suggested that if North and Cleary JJ. had gone to the dictionary to determine the meaning of the disputed phrase their decision would have been any different. But at least such an approach would have emphasised the fact that matters of law—and whether a publication is indecent within the meaning of the Act is a matter of law—are for the courts and not for the community.

A. G. Davis.

Decrees Nisi and Nuptiality

Two recent cases illuminate that curious legal twilight between decree nisi and decree absolute in divorce.

In *Cook* v. *Cook* [1] the short question was whether the Divorce Court had jurisdiction after decree nisi but before decree absolute to grant the wife an injunction ordering the husband to leave the matrimonial home forthwith and restraining him from molesting or interfering with her. The wife obtained a decree nisi in November

22 [1960] V.R. 425.
23 At p. 432.
24 [1959] V.R. 57 at p. 62.
25 [1959] V.R. 420.
26 At p. 426.
1 [1961] 2 All E.R. 791. Also reported at [1961] 3 W.L.R. 432.

1960 on the ground of cruelty but had delayed having it made absolute because she claimed that a post-nuptial settlement existed in respect of the home and wished this claim to be adjudicated upon before decree absolute. Although the conveyance of the home had been taken in the husband's name, she alleged that she had contributed £250 and he £150 towards its purchase and that it had been agreed to effect the purchase in their joint names. Accordingly, in January 1960 she had given notice seeking a variation of this alleged post-nuptial settlement so as to be allowed to remain in the matrimonial home with her children, but there had been no adjudication upon this issue at the time of the decree nisi nor subsequently.

In March 1961 the present proceedings for an injunction came before Lloyd-Jones J., who had pronounced the decree nisi the previous November. Both spouses were still residing in the house, as they had been doing since the original petition for divorce was filed in June 1959. Before the divorce suit was heard, the husband, on the wife's application, had given two separate undertakings not to molest or make advances to the wife pending the hearing. After the decree nisi he had committed clear breaches of these undertakings by repeated assaults and abuse of his wife.

For the husband it was argued that the court had no jurisdiction to grant an injunction in the form asked. His counsel submitted that once a decree nisi had been propounded the parties became strangers and all that remained, in effect, was the administrative act of granting the decree absolute. Although the interval afforded opportunities for interventions by the Queen's Proctor and others, in counsel's submission there was really no suit in being on which the court could found jurisdiction.

For her part counsel for the wife relied upon *Rayden on Divorce*, 8th ed. at p. 495, para. 35, where, under the heading " Molestation," it is stated:

> " When a matrimonial suit is pending (but not after final decree or after the petition has been dismissed) the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation."

Counsel argued that a decree nisi is not a " final decree," so that the court had jurisdiction to give the wife the relief sought. She distinguished *Smith* v. *Smith* [2] where the decree was one of judicial separation and Butt J. said [3] " the parties are now strangers to each other and I have no jurisdiction over them. The proper person for Mr. Smith to apply to is a police magistrate." The present case, as counsel emphasised, concerned a decree nisi of divorce, not a decree of judicial separation.

Lloyd-Jones J. was persuaded by this argument. Finding support in the remarks of Pearce J. (as he then was) in *Silverstone* v. *Silverstone* [4] where a husband was restrained from entering the

[2] (1889) 59 L.J.P. 15.
[3] At p. 16.
[4] [1953] 1 All E.R. 556; [1953] P. 174.

matrimonial home pending the hearing of a petition even though he owned the premises, he stated the matter thus:

> " There is no authority directly in point, but I cannot accept the submission that the court is only entitled to act in that way where there has been no decree nisi—that is, only up to the date of the decree nisi—and it seems to me that if the court is satisfied, there being a suit still in existence, as there is in the present case, that the party who asks for relief is in danger of being bullied out of some remedy which she seeks or is being subjected to pressure, then, by a parity of reasoning, the court is equally entitled to act certainly up to the date of decree absolute. I say nothing about what the position might be after decree absolute because I am not asked to deal with that."

The learned judge referred to the decision in *Gorulnick* v. *Gorulnick*.[5] In that case the Court of Appeal accepted that there was authority [6] to issue an order which might involve one spouse ceasing to live under the same roof as the other, although in the circumstances of that case they did not feel justified in interfering with the exercise of the discretion by the trial judge who had refused such an order. The matrimonial right of the husband to consort with his wife in the matrimonial home was therefore allowed to prevail over the proprietary right of the wife to exclude him from her house under section 12 of the Married Women's Property Act, 1882. Although ostensibly [7] proceedings under that section, *Gorulnick*, like *Silverstone* and the present case, was concerned with the inherent jurisdiction of the Divorce Court to prevent what may be broadly termed " molestation pending suit ": the court must have power to protect a spouse involved in divorce proceedings from physical intimidation by the other spouse calculated to upset the *status quo* or to gain some tactical advantage pending the final determination of the suit.[8] Similar objectives, of course, underlie the court's power to award alimony pending suit and so to prevent the financial intimidation of an economically dependent spouse.[9]

As Lloyd-Jones J. indicated, a different situation was involved in *McDowell* v. *McDowell*,[10] where the proceedings were brought under section 17 of the 1882 Act and were not concerned with protecting the wife's person from molestation nor with protecting her property under section 12 of that Act. In *McDowell* the matrimonial home was jointly owned by the spouses, and the wife sought an order for sole possession after she had obtained a decree of

[5] [1958] 1 All E.R. 146; [1958] P. 47; and see critical note of A. Milner in (1958) 21 M.L.R. 315.
[6] *e.g.*, *Shipman* v. *Shipman* [1924] 2 Ch. 140, where the wife successfully invoked the Married Women's Property Act, 1882, s. 12.
[7] See headnote in [1958] 1 All E.R. 146, but compare language of Morris L.J. at p. 149F and p. 150B.
[8] See [1958] 1 All E.R. 146 at p. 148 (*per* Hodson L.J.).
[9] See *Slater* v. *Slater* [1960] 3 All E.R. 217 at p. 219D (*per* Pearce L.J.).
[10] (1957) 107 L.Jo. 184.

judicial separation: the Court of Appeal, reversing the trial judge, held that section 17 gave no power to oust one spouse where both had equal rights of ownership. *McDowell* in no way conflicts with *Lee* v. *Lee* [11] and the other " deserted wife " cases, where, even though the husband has a clear title to the property, the court is prepared in section 17 proceedings to protect the wife's occupation for such period as it thinks fit; for the wife in *McDowell* was not a deserted wife and was seeking to use the section not as a shield for herself but as a sword to drive out her husband.

Having thus satisfied himself that he had jurisdiction, the learned judge decided that this was a proper case for the grant of the discretionary remedy sought. For if the husband were allowed back in the matrimonial home, he could not be trusted to behave himself, and even if he were enjoined to do so, the wife could not tolerate living in the same house with him again, which meant that she would have to leave for the sake of her own health and well-being.[12]

In *Young* v. *Young*,[13] the second of the cases under review here, the question arose whether a maintenance deed executed by the spouses after decree nisi but before decree absolute was a " post-nuptial settlement " within the meaning of section 25 of the Matrimonial Causes Act, 1950, so that the husband could apply for its variation by the insertion of a *dum sola* clause. In the deed, which was entered into in May 1945, the husband covenanted to pay annuities to the wife during their joint lives and to their two children until the age of 16.[14] The deed recited that this provision was made by mutual agreement in lieu of the wife applying to the court for maintenance, as she was entitled to do. The deed came into effect, and three payments fell due, before the date of the decree absolute.

In 1956 the wife remarried and the husband stopped payments in May 1957. An action for arrears was begun but discontinued as the wife's advisers believed that she could not succeed because of the decision in *Bennett* v. *Bennett*.[15] In that case the Court of Appeal had held that a very similar agreement before decree absolute was void for want of consideration inasmuch as the wife's promise not to apply for maintenance was contrary to public policy as an attempt to oust the jurisdiction of the court. After the Maintenance Agreements Act, 1957, came into force on August 17, 1957, a fresh

11 [1952] 1 All E.R. 1299; [1952] 2 Q.B. 489, n.

12 Two recent cases where the court intervened to protect a wife from molestation are *Hipgrave* v. *Hipgrave*, *The Times*, August 31, 1961, and *Lewis* v. *Lewis*, *ibid.* In *Jedfield* v. *Jedfield*, *The Times*, November 10, 1960, the wife's application for an injunction to protect her from molestation was unsuccessful.

13 [1961] 2 All E.R. 843.

14 Or until leaving school, whichever was the later.

15 [1952] 1 All E.R. 413. Even before being overruled by the 1957 Act, the ambit of this decision had been curtailed by the process of distinguishing, notably in *Goodinson* v. *Goodinson* [1954] 2 All E.R. 255 and *Williams* v. *Williams* [1957] 1 All E.R. 305.

action for arrears from that date was brought in reliance upon section 1 (2). This validated the financial arrangements in a written maintenance agreement, notwithstanding the inclusion of a provision purporting to restrict the right to apply to the court for maintenance, although still declaring such provision itself to be void. The county court judge who tried the case found for the wife and the Court of Appeal dismissed the husband's appeal, holding that the agreement fell within the 1957 Act and that the husband's covenants were valid. Hence the present proceedings in which the husband sought to vary his liability under the maintenance deed.[16]

The husband was not able to invoke the 1957 Act to obtain a variation of the deed,[17] since the provisions of that Act for the variation of maintenance agreements only apply where both parties are either domiciled or resident in the U.K.,[18] and the wife had been domiciled and resident in the Australian State of Victoria since her remarriage. But for this obstacle the deed would clearly have fallen within the terms of the Act, which applies to any written agreement made before or after the Act between the parties to a marriage for the purposes of their living separately, being (*inter alia*) " an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage." [19]

The 1957 Act not being available to found the action for variation, the husband was driven back to the (for him) less sure ground of section 25 of the 1950 Act. This required him to show " the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree." What is meant by such settlements is the subject of an extensive case-law, in which the courts have sought to define the twin requirements that there be a " settlement," and that it have a " nuptial " character.

There was no doubt that the deed of 1945 was a settlement. Although the term is not defined in the 1950 Act, the courts have always construed " settlement " liberally in this context so as to include much more than the conveyancer's notion of property limited to persons in succession.[20] The essential feature, as emphasised in *Bosworthick* v. *Bosworthick* [21] and *Prescott* v. *Fellowes*,[22] is that there should be some continuing provision or one involving periodicity of payments. Thus, the undertaking to pay an

[16] The insertion of a *dum sola* clause would have ended his liability under the deed since the child annuitants had by this date attained 16 and left school.
[17] As distinct from its validation under s. 1 (2).
[18] s. 1 (3) (*a*).
[19] s. 1 (1).
[20] Although not, apparently, a settlement by will (*Loraine* v. *Loraine* [1912] P. 222); but Bromley (*Family Law*, p. 430) considers this case has been misunderstood.
[21] [1926] P. 159; affd. [1927] P. 64 (C.A.).
[22] [1958] 1 All E.R. 824.

annuity has been held to be a settlement,[23] a decision in point in the present case; so too have a separation agreement containing financial provisions,[24] and a deed of conveyance vesting a house in spouses upon the usual joint tenancy clauses.[25] On the other hand, an out-and-out gift or an absolute transfer of property [26] is not a settlement.

It was over the required nuptial element that judicial opinion diverged in the present case. The learned registrar who heard the husband's summons for variation agreed with the wife that this was not a post-nuptial settlement and dismissed the summons. Baker J., to whom the husband appealed, found in his favour, only to be reversed by the Court of Appeal. Moreover, the husband obtained leave to appeal to the House of Lords, which appeal is still pending.

The difference of opinion between Baker J. and the Court of Appeal (Ormerod, Upjohn and Davies L.JJ.), which the House of Lords will have to resolve, is of considerable interest. The learned judge, after reviewing the principal judicial definitions of nuptiality,[27] was persuaded that the deed constituted a post-nuptial settlement: " In May 1945 the parties were still man and wife. The settlement was made because of the marriage, the agreement being expressly between husband and wife. Two payments had to be made before decree absolute,[28] and had it not been expedited, there would have been at least five." Moreover, he felt unable to distinguish *Melvill* v. *Melvill* [29] where the Court of Appeal held a settlement made after the husband had filed a petition for divorce to be a post-nuptial settlement on the ground that it made a settlement of property, the wife of the existing marriage being the settlor and the issue of the existing marriage being among the beneficiaries. In the present case, as in *Melvill*, the annuities provided for the children seemed to the learned judge to be a crucial element. Furthermore, it seemed to him that it could be said that there was a settlement on the wife in her character as wife: " She was not a mistress, nor a spinster, nor a single woman; she was a wife, the

23 *Jump* v. *Jump* (1883) 8 P.D. 159; *cf. Brown* v. *Brown* [1936] 2 All E.R. 1616, where the *purchase* of an annuity was held to be an outright gift, not a settlement.

24 *Cooper* v. *Cooper* [1932] P. 75. O. M. Stone has doubted whether this case is still valid: (1958) 21 M.L.R. 59, n. 19; but Baker J. does not question that a separation agreement may be a settlement (at p. 846D), as is shown by *Tomkins* v. *Tomkins* [1948] 1 All E.R. 237 and *Jeffrey* v. *Jeffrey* (*No. 2*) [1952] 1 All E.R. 790.

25 *Smith* v. *Smith* [1945] 1 All E.R. 584; *Brown* v. *Brown* [1959] 2 All E.R. 266 (C.A.).

26 As in *Hindley* v. *Hindley* [1957] 2 All E.R. 653 and *Prescott* v. *Fellowes* (cited note 22, *supra*).

27 *viz.*, *Worsley* v. *Worsley* (1869) L.R. 1 P. & D. at p. 651, *per* Lord Penzance; *Bosworthick* (cited note 21, *supra*) at p. 72, *per* Romer J.; *Hargreaves* v. *Hargreaves* [1926] P. at p. 45, *per* Hill J.; *Prinsep* v. *Prinsep* [1929] P. at p. 232, *per* Hill J.; *Lort-Williams* v. *Lort-Williams* [1951] 2 All E.R. at p. 245, *per* Denning J.

28 In fact, *three* payments fell due before decree absolute, as the learned judge points out earlier in his judgment (p. 845D).

29 [1930] P. 159.

wife, and she so remained to decree absolute. The first monthly payments cannot have been made to her otherwise than in her character as wife, on the footing of, because of and with reference to the interests of herself and her children."

The Court of Appeal reached the opposite conclusion.[30] In their view when the deed was executed the marriage had to all intents and purposes come to an end through the pronouncement of the decree nisi. The deed, being executed, not on the footing of a continuation of the marriage, but on the footing that it was to be dissolved, did not constitute a post-nuptial settlement. As Upjohn L.J. observed, the whole tenor of the agreement looked at as a whole was to make provision for the wife and the children after the marriage had been terminated.

The decision of the Court of Appeal would seem, with respect, to be more in accord with the ordinary meaning as well as the underlying purpose of section 25. The law of divorce and the law of contract should be left to co-exist in their respective zones unless there is some compelling reason for allowing the former to invade the territory of the latter. Undoubtedly, the Divorce Court must have power to conduct a financial stocktaking upon the liquidation of a marriage. The House of Lords has affirmed this principle,[31] to implement which various techniques have been evolved by statute or the practice of the court. One such technique is section 25 which opens a settlement to review and variation when the basis of the contract is removed by a decree of divorce or nullity. An alternative approach is to regard the section as an attempt to fulfil the underlying intentions of the parties by implying a *rebus sic stantibus* clause into their contract: once the circumstances envisaged disappear, namely, the continuance of the marriage, the courts may rewrite the bargain.[32] On either approach the deed in the present case was made with the end of the marriage in contemplation, not its continuance. It was a divorce settlement, not a nuptial one.[33] It was also, of course, a maintenance agreement and, but for the removal of the wife to Australia, would have been variable under the different principle and procedure of the 1957 Act.[34] But the power to interfere with agreements under that Act could not be stretched outside the limits of domicile and residence prescribed by Parliament, although the present case prompts the question whether those limits are not too narrowly drawn.

The two cases reviewed in this note show well the empirical approach of the English courts when faced with a fundamental

30 Reported as *Y.* v. *Y.* (1961) *The Times*, July 26.
31 *Hyman* v. *Hyman* [1929] A.C. 601.
32 This explanation is akin to the discarded "implied term" rationale of the common law doctrine of frustration in contract, but s. 25, unlike that doctrine, allows the court to replace the frustrated bargain with a different one.
33 Thus, only in the loosest sense could it be said to be made (in Baker J.'s phrase) "because of the marriage."
34 Fully discussed by O. M. Stone in (1958) 21 M.L.R. 57.

question like the exact status of the spouses between decree nisi and decree absolute. In *Cook* the spouses' relationship to each other was regarded as more than that of strangers, whereas in *Young* it was treated as an empty shell. And both answers, it is submitted, in their contexts make good sense and good law.

L. Neville Brown.

The Meaning of "Reckless"

The Prevention of Fraud (Investments) Act, 1958, which replaced the Act of 1939, prohibits the reckless making of any statement, promise or forecast which is misleading, false or deceptive for the purpose of inducing the sale or purchase of shares.[1] Although there have been five reported cases on this section,[2] the Court of Criminal Appeal has yet to give an authoritative ruling on the meaning of "reckless," and the recent case of *R.* v. *Grunwald*,[3] which dealt with one aspect of the recent activities of the Jasper group of companies, has done little to clarify the present confused state of the law in this field.

The case is reported for the direction given by Paull J. on the meaning of "reckless," and for his summing-up on the evidence relating to the counts charged under the section. The learned judge purported to disagree with the existing difference of judicial opinion, and suggested a third approach to the interpretation of the section. On the one hand, there was the case of *R.* v. *Mackinnon*,[4] in which Salmon J. took the view that "reckless" was to be interpreted in the same sense as in *Derry* v. *Peek*,[5] so that it was necessary for the Crown to prove the absence of an honest belief on the part of the defendants. Against this, there were the views of Donovan J.[6] and Judge Aarvold [7] to the effect that "reckless" was equivalent to "careless," so that a person could be convicted although he honestly believed his statement to be true. In the view of Paull J. the jury had to consider whether the statement was reckless, as defined by the *Oxford English Dictionary*.[8] The statement must be rash, and it must be made heedless of whether the person making it has any real facts on which to base his statement. Since it is not necessary to prove dishonesty, a statement may be reckless although

1 s. 13 (1) (s. 12 (1) of the 1939 Act).
2 *R.* v. *Bates* [1952] 2 All E.R. 842, affd. *sub nom. R.* v. *Russell* [1953] 1 W.L.R. 77; *R.* v. *Blackburn* (1955) 39 Cr.App.R. 84 (burden of proof); *R.* v. *Moore* [1956] Crim.L.R. 264 (sufficiency of evidence); *R.* v. *Mackinnon* [1956] 1 Q.B. 150; *R.* v. *Grunwald* [1961] 2 W.L.R. 606.
3 [1961] 2 W.L.R. 606. Also reported at [1960] 3 All E.R. 380.
4 [1959] 1 Q.B. 150.
5 (1889) 14 App.Cas. 437.
6 *R.* v. *Bates* [1952] 2 All E.R. 842, approved *obiter*, by the Court of Criminal Appeal.
7 At the new trial occasioned by the direction of Salmon J. in *R.* v. *Mackinnon*, *supra*. See [1958] Crim.L.R. 809–811.
8 "Characterised . . . by heedless rashness."

the person making it thinks that it is true. However, if a man expresses an opinion with which others may disagree, it is not reckless if it is based on facts which he has reason honestly to believe exist.[9] With respect, this direction bristles with so many ambiguities as to mislead a jury, the main one being a failure to distinguish clearly recklessness and *evidence* of recklessness. Although it is possible to treat the direction as consistent with the definition in *Derry* v. *Peek*,[10] it is submitted that it is more consistent with that of Donovan J. in *R.* v. *Bates*.[11]

To the general criticism that the case is yet another example of the failure to develop a consistent meaning for the concept of recklessness,[12] one may add three further comments. First, it is respectfully submitted that the learned judge misread the words of the section. The statement, promise or forecast is already " characterised " by the Act, in the sense that it must be misleading, false or deceptive: its *making* must be reckless.[13] Secondly, a dictionary, however well compiled, is an uncertain guide to the meaning of words in Acts of Parliament, which must be read in the context of the general law of the country.[14] One would think that a textbook, written by a trained lawyer whose identity is disclosed, or a judicial dictionary, would be more helpful than works of reference designed for a wider category of persons.[15] Thirdly, there is some confusion about the meaning of " dishonesty," which appears to originate in the opinion of Donovan J., in *R.* v. *Bates*,[16] that there is a distinction between a statement made recklessly, without belief in its truth, and one made recklessly, but with belief in its truth. But Lord Herschell's distinction in *Derry* v. *Peek* was in relation to *careless* statements; there was no suggestion that *reckless* statements could be similarly subdivided.[17]

Lord Herschell pointed out that the essence of fraud is the absence of an honest belief in the truth of a statement.[18] This is the factor which distinguishes careless statements from those made recklessly or intentionally (*i.e.*, with knowledge of the falsity). A

9 [1961] 2 W.L.R. 606, 610.
10 (1889) 14 App.Cas. 437.
11 [1952] 2 All E.R. 842.
12 *Cf.* (1953) 16 M.L.R. 234.
13 The standard of proof may differ according to whether the prosecution is based on a statement or a forecast. Gross negligence may be sufficient in the case of a deceptive forecast.
14 See *Fisher* v. *Bell* [1960] 3 All E.R. 731, 732–733; [1961] 1 Q.B. 394, 399. Even in a wider context, the inadequacy of a dictionary is illustrated by a reference to the meaning ascribed to the words " rash " and " heedless."
15 The reasons for rejecting textbooks as authorities cannot justify the refusal to examine incisively the arguments presented therein. Apparently it is quite in order to cite a textbook against its author if he wishes to assert a proposition contrary to his earlier opinion! See *British Land Co. Ltd.* v. *Herbert Silver (Menswear) Ltd.* [1958] 1 All E.R. 833, 932–938. Some encouragement may be derived from the view of Mr. Justice Salmon in (1961) 14 *Current Legal Problems*, 1, 8.
16 [1952] 2 All E.R. 842, 844.
17 (1889) 14 App.Cas. 337, 361.
18 *Ibid.*, p. 374.

careless statement is not ordinarily regarded as dishonest, but if the person making it does not believe in its truth, he must be treated in the same way as one who makes a false statement with knowledge of the falsity. Dishonesty in relation to a false statement means an absence of honest belief in the truth of the statement: it has nothing to do with the motives for making the false statement.

However favourably one views the direction on the law, the learned judge's summing-up on the facts does not escape criticism. In respect of the counts against Jasper, the learned judge directed the jury that there was no evidence that the statements were made recklessly. With regard to the first two, which were based on the offers to the shareholders of Lintang Investments Ltd. and Ely Brewery Co. Ltd., there was ample evidence that Jasper believed that sufficient money would be forthcoming to pay for the shares.[19] The third count was based on a letter, signed by Jasper and delivered to Mr. Nidditch, the Chairman of Ely Brewery Co. Ltd., which promised that the shareholders would be paid in accordance with the terms of the offer. Before the letter was delivered, Jasper knew, and had confessed to Nidditch, that the money would not be available. He also knew that there was certain money (*i.e.*, the funds of the State Building Society) which could not be used legally. It would be difficult to find stronger evidence of recklessness, and the learned judge was inclined to take the same view of the evidence.[20] However, before signing the letter, Jasper telephoned Kanter (Grunwald's partner) in London. Kanter did not tell Jasper that Grunwald had left the country, but he advised Jasper that it would be proper and right to sign the letter. Because Jasper acted on this advice, the learned judge thought that there was no evidence of recklessness.[21] Jasper was accordingly acquitted, in spite of the fact that Kanter was familiar with all the facts known to Jasper.[22] Although Kanter's concealment of Grunwald's disappearance may have led Jasper to assume that the money for the shareholders would be available within a few days, one would think that it should have been for the jury to decide whether the inference should be drawn. The matter was, of course, within the judge's discretion, and he may have thought it unsafe to do so having regard to the nature of the prosecution's case against Grunwald and Murray. Although there are strong arguments in favour of allowing a defendant to plead reliance on legal advice, the defence has not yet been accepted by the English courts.[23]

If Jasper was acquitted because he relied upon the advice of a

19 See [1961] 2 W.L.R. 606, 612.

20 [1961] 2 W.L.R. 606, 614.

21 *Ibid.*, p. 615.

22 The disappearance of Grunwald was irrelevant to Jasper's knowledge, since it would not have led him to believe that the money would be available.

23 *Cooper* v. *Simmons* (1862) 7 H. & N. 707; 158 E.R. 654; *R.* v. *Davies* (1928) 20 Cr.App.R. 166; *Howell* v. *Falmouth Boat Construction, Ltd.* [1951] A.C. 837. The defence of claim of right is, of course, a well-known exception.

solicitor, Grunwald was convicted because he was a solicitor. The count against Grunwald related to the offer addressed to the shareholders of Lintang Investments Ltd., for which the consideration was to be in the region of eight million pounds. Summing-up the evidence, Paull J. told the jury that with about five million pounds from the State Building Society and money from other reliable sources, there were sufficient funds to support the offer.[24] However, if they thought than Grunwald, as a solicitor, knew that using the money of the State Building Society for his own purposes amounted to fraudulent conversion they ought to disregard that source in determining whether he had any basis for his statement. Without that money, the statement would be reckless.[25] Clearly no man can use the money of others to purchase shares for his own benefit, but it does not follow that his offer for the shares is reckless. At the time of making the statement he does have the money, and if the shareholders transfer their shares in good faith their title to the money is good against the real owners. The 1958 Act is designed to protect the interests of shareholders and not to safeguard the funds of building societies. If the existing provisions are inadequate to prevent serious breaches of trust, it is not for the courts to strain the definition of some other crime having an entirely different object. It is difficult for a jury to believe that a man who has been fraudulent on one occasion could have acted honestly on another, but it is regrettable that a judge should direct them to adopt such an attitude, as was done by Paull J. in this case.

B. W. M. Downey.

Capacity to Marry and the Lex Loci Celebrationis

The sorry state of the conflict of laws in relation to nullity is largely due to the difficulty experienced by English courts in recognising problems of choice of law when confronted with them.[1] This blind

[24] See [1961] 2 W.L.R. 606 at pp. 612, 616.

[25] [1961] 2 W.L.R. 606, 616–617. Grunwald was also charged with, and convicted of, the fraudulent conversion of the funds of the State Building Society.

[1] The more recent instances of what Dr. Cheshire describes as a "long-standing blemish" of this branch of law (*Private International Law* (6th ed. 1961) at p. 370) are in *Easterbrook* v. *Easterbrook* [1944] P. 10, and in *Hutter* v. *Hutter* [1944] P. 95, where the *lex fori* was applied in disregard of the claims of the *lex domicilii*; in *Mehta* v. *Mehta* [1945] 2 All E.R. 690, where the *lex fori* was applied in disregard of the *lex loci celebrationis* and the *lex domicilii* of the husband; in *Silver* v. *Silver* [1955] 2 All E.R. 614, where the *lex fori* was applied in disregard of the *lex loci celebrationis* and of the *lex domicilii* of the wife. In *H.* v. *H.* [1954] P. 258, in a petition for nullity for duress English law was applied although neither party had been domiciled here at the time of the marriage which had taken place in Hungary. On this occasion Karminski J. had pointed out that "in a case of this kind the question almost inevitably arises as to what system of law is applicable," but he then concluded that the choice between English and Hungarian law was "almost academic" since both laws agreed in treating a marriage as voidable for duress. This treatment of the question of choice of law would appear inadequate, not only because s. 18 (3) of the Matrimonial Causes Act, 1950, was overlooked, but also because it is not certain whether duress renders a marriage voidable or void.

spot has become particularly dangerous as a result of the current tendency to multiply the bases of nullity jurisdiction.[2] Decrees given on the rather slender jurisdictional foundations which are now thought sufficient in English courts are not likely to be respected abroad unless meticulous attention is paid to questions of choice of law.[3] It is therefore disturbing to find that once again the presence of a choice of law problem appears to have been overlooked in the recent decision of Karminski J. in *Breen* v. *Breen* [4] although on this occasion it was the *lex loci celebrationis* and not, as usual, the *lex fori* which was applied as the result of this oversight.

The parties were married in Dublin in 1953. The husband had been married before, also in Dublin, but this marriage had been dissolved in 1952 by a decree of divorce given by an English court. The husband had always been domiciled in England and nothing was said in the judgment about the domicile of his second wife at the time of the marriage in 1953.[5] The petition was presented by the wife on the ground that in Eire by virtue of article 41, section 3 (3) of the Constitution of Ireland of 1937,[6] the divorce granted in 1952 was not recognised so that, as the first wife was still alive, the marriage celebrated in 1953 was bigamous and void.

The petition was dismissed on the ground that article 41 of the Irish Constitution did not prohibit recognition of divorces granted by the courts of the domicile of the parties. The judgment of Karminski J. was given up entirely to the task of interpreting article 41 and choosing between the conflicting views on this provision expressed *obiter* by two judges of the Irish Supreme Court in *Mayo-Perrott* v. *Mayo-Perrott*.[7] Nothing was said, however, in this

2 See *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115, and *Ross Smith* v. *Ross Smith* [1961] 1 All E.R. 255.

3 "What must be resisted at all costs is the present tendency to apply the *lex fori* as a matter of course": Cheshire, *op. cit.*, at p. 360.

4 [1961] 3 All E.R. 225. Also reported at [1961] 3 W.L.R. 900.

5 She had then been a widow, her former husband, a Mr. Smith, having died in 1942. Her petition asserted that the parties were now, *i.e.*, in 1959, domiciled in England; alternatively that the wife had been ordinarily resident in England for three years. This alternative pleading carries a hint that the wife may not have been domiciled in England at the time of the marriage but it falls short of suggesting that the wife was then domiciled in Eire.

6 This subsection states that "no person whose marriage has been dissolved under the civil law of any other state but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within the jurisdiction during the lifetime of the other party to the marriage as dissolved."

7 [1958] I.R. 336. In this case, which was fully discussed by P. R. H. Webb in (1959) 8 I.C.L.Q. 744, it was held that it would be contrary to public policy to enforce in Eire an order for costs made by an internationally competent English court when granting a decree of divorce. Whereas Maguire C.J. thought that art. 41, s. 3 (3) prevented recognition of foreign divorces in Ireland, Kingsmill Moore J. considered that the prohibition of remarriage did not extend to persons divorced by a competent foreign court. In spite of Karminski J.'s preference for the opinion of Kingsmill Moore J., the effect of the subsection remains unsettled in Eire as well as in England. Moreover, a petition for nullity could be presented in Eire by either of the parties in

pointing to a different conclusion. Thus, Wolff described a similar situation brought about by the refusal of Italian law to recognise divorces between Italian subjects as one where international harmony, demanding the application of Italian law, would be too dearly bought at the price of internal dissonance. " An English court," he therefore concluded, " cannot be expected to treat a marriage as existing in spite of a divorce decree which it has itself pronounced and which was entirely correct." [14] These observations, made in the course of discussing the so-called " incidental question," must be contrasted with others,[15] addressed to the specific question of remarriage after divorce, where the Italian *impedimentum ligaminis* is said to prevent a valid marriage in England by Italians domiciled in England who had been previously divorced in an English court. The fact that these statements, even allowing for their different contexts, appear incapable of reconciliation aptly illustrates the difficulty of this problem.

A solution, it is submitted, cannot be found by stressing the " internal dissonance " resulting from disregard by a court of its own decrees. It should make no difference that the decree was given by the courts of another country as long as they were competent to do so. If an English court cannot be expected to ignore its own decrees it also cannot be expected to ignore those given properly in other countries, and the reason for treating this expectation as exorbitant must be found in the law which makes such demands. The prohibition of remarriage of divorced persons under Italian and possibly under Irish law cannot be classified as penal, not only because it applies to both parties, but because it derives from the concept of marriage as an indissoluble union and not from any notions of punishment. On the other hand English public policy may prevent the enforcement of impediments to marriage which are not penal but inspired by religious dogma, such as the *impedimenta ordinis* and *voti*, imposed on priests, monks and nuns, which are in force in some Catholic countries.[16] Yet public policy is more readily offended by a requirement of celibacy imposed on

can be stated in the form of a rule denying to persons, married or unmarried, who are domiciled in England, capacity to marry polygamously wherever such marriage be celebrated (Dicey, Rule 36). It is submitted that there is no such rule but that the attempt to formulate it results from the fallacy of translating the qualities of the institution of marriage in English law into terms of personal capacity.

[14] *Private International Law* (2nd ed. 1950) at p. 210.

[15] At p. 379.

[16] Dicey, *op. cit.* at p. 15. It is generally accepted that public policy could and should control the application of foreign laws imposing impediments. The Royal Commission on Marriage and Divorce, 1951–55, Cmd. 9678, para. 885, p. 233, recommended, however, that English courts should grant nullity decrees in respect of marriages void for miscegenation under the personal law of the parties. The explanation offered for this surprising disregard of the possibilities of public policy, *viz.*, that " the court's decree is merely declaratory of the position under the personal law," implies—wrongly, it is submitted—that there is no difference between recognising a foreign decree of nullity and giving a decree in application of foreign law.

unmarried than on married and divorced persons. In the last resort the attitude to be adopted by English courts to prohibitions of remarriage by divorced persons must depend on the attitude taken by the courts to the institution of divorce. Although, in the words of the Royal Commission on Marriage and Divorce, the state has recognised " that in certain circumstances it would be contrary to public policy and would inflict hardship on individuals if the marriage could not be dissolved . . . and the parties set free to marry again," [17] it would seem doubtful whether this sentiment can be translated into a rule of *ordre public international*.

J. Unger.

An Ineffective Gift

In *Spellman* v. *Spellman* [1] the facts were not as follows:

> Relations between H. and W. having deteriorated after three years of marriage, the couple decided to have another car to see whether this would bring them together again. H. bought a new Austin Healey Sprite, and when W. first saw the car H. told her that it was the car he had bought for her. H. had the idea of making a gift of the car to W., and it was registered with the local authority under the Vehicles (Excise) Act, 1949, in W.'s name. Although it was intended that W. would learn to drive the Sprite she had not done so when, three weeks later, H. left her, taking the Sprite with him. H. and W. both claimed the car in an application under section 17 of the Married Women's Property Act, 1882.

If those had been the facts, what would the result have been? It is, of course, impossible to say. The courts sometimes place importance on what the parties " must be taken to have intended at the time of the transaction itself " [2]; here the parties seem to have thought of the car as a gift from H. to W., and therefore W. may have succeeded. Alternatively, H. and W. might possibly have been held to be jointly entitled to the new car.

But those were not the facts. What really happened was that H. did not, in law, buy the Sprite: he entered into a hire-purchase agreement whereby he agreed to hire the car for up to two years, and obtained an option to purchase the car if certain conditions were fulfilled. In the result, the real owner of the car not being before the court, and his views not being known, H. succeeded in his claim, and W. was ordered to sign the registration book of the car and to deliver it to H.

These were the different points raised in argument, and the way in which the court disposed of them:

17 Cmd. 9678. para. 36, at p. 7.
1 [1961] 1 W.L.R. 921; [1961] 2 All E.R. 498 (C.A.).
2 *Re Rogers' Question* [1948] 1 All E.R. 328, *per* Evershed M.R.

Gift. " It is probable," said Danckwerts L.J.[3] " that the parties originally had no conception of the position of the motor car except that of an ordinary gift of a motor car, a chattel, from the husband to the wife." But, of course, H. could not give what he did not own, so no property in the car could pass to W.

Equitable assignment of a chose in action. " The various rights which were owned by the husband under the hire-purchase agreement," said Danckwerts L.J., ". . . would be a chose in action and . . . could be the subject of an equitable assignment which would not require to be in writing, nor, if it was done in an effective manner, would it require consideration. . . . No form of words is required for the purpose of making an equitable assignment as long as the intention can be fairly collected from what was said between the parties or even from a course of conduct."

The parties originally thought of the position as a gift of the car from H. to W. and, said Danckwerts L.J., " the fact that the wife's name was put in the log book is some evidence of an intention to convey the ownership of the car to the wife." Yet the learned Lord Justice held that this was " not sufficient for the purposes of the transfer of equitable rights which would be required by an equitable assignment."

Why was there no sufficient evidence of an intention to make an equitable assignment? Must the parties appreciate that they are assigning a chose in action rather than conveying property? Clearly not.[4] Perhaps the reasoning runs on these lines. H. intended to give the car to W. Taking the car on hire-purchase in his own name, he must be taken to have intended to pay the instalments and to carry out the other terms of the hire-purchase agreement to which he, and not W., was a party. The hire-purchase agreement prohibited H. from assigning the benefit of the agreement [5] or from parting with possession of the car. Therefore the intention to be deduced from these facts is that H. intended to retain possession of the car, to permit W. to use it (apparently this was not prohibited by the agreement) and, when he had exercised the option to purchase and acquired the property in the car, to give the car to W. There was therefore no present assignment of rights, but a mere intention to make a future gift, which neither law nor equity would enforce.

Intention to create legal relations. Another reason—the main reason, in Willmer L.J.'s view—why W. failed was that there was

[3] With whom Ormerod L.J. agreed on all points.

[4] *Whiteley* v. *Hilt* [1918] 2 K.B. 808 (C.A.).

[5] This was not of itself a fatal objection to an equitable assignment, according to Danckwerts L.J., citing *Re Turcan* (1888) 40 Ch.D. 5. On the other hand, Willmer L.J. thought that this provision made it " quite impossible " for W. to succeed, because a court order in W.'s favour " would in effect require the husband to break his contract with the hire-purchase corporation." If an equitable assignment had been effected what would W.'s position have been if H. had later ceased to pay the instalments?

no intention to create legal relations: this was " merely an informal dealing with the matter between the husband and wife which is common in daily life and which does not result in some legal transaction, but is merely a matter of convenience " (*per* Danckwerts L.J.). This doctrine—the " *Balfour* v. *Balfour* [6] principle "—is, of course, well known in its application to alleged contracts. But applications under section 17 of the 1882 Act are not really based on contractual rights; the court is empowered, in any question between husband and wife as to the title to or possession of property, to make such order with respect to the property in dispute as it thinks fit. Once property is acquired, the absence of any intention to create legal relations is, it is submitted, irrelevant. Whether the parties like it or not, their relationship, with the property and *inter se*, is a legal relationship.

Suppose, for instance, H. had bought the car outright and delivered it to W. Would the gift be upheld? Not if the absence of intention to create legal relations is vital. For to pass the property in goods by way of gift there must be either a deed (the formality of which doubtless displays an intention to create legal relations) or delivery to the donee with intention to give; and an intention to give must surely contemplate a legal relationship—that of donor and donee. There are ample precedents for legal relationships such as this—intended or not—being upheld. As Professor Kahn-Freund said of an earlier case [7]: " *Balfour* v. *Balfour* was indeed most relevant to the decision, but it should have yielded the lesson that section 17 [of the 1882 Act] ought to be applied without making the attempt to cast the mutual dealings between the spouses into the mould of legal institutions, whether they be contract, gift or trust "—or, we may now add, assignments of choses in action.[8]

Indeed, what the court has done in the instant case is not, it is submitted, to rely on the *Balfour* v. *Balfour* principle at all. It has instead expressed a finding of fact—a finding that, by taking the car on hire-purchase, H. did not seriously mean to give the car to W. at all at that stage. What the result would have been had H. taken the car under a credit-sale agreement whereby no property passed to him (were such agreements in use in this country with respect to cars) is anyone's guess. Probably the result would have been the same. But if H. had, instead, bought the car with the aid of a personal loan from his bank the result might have been very different.

The case is yet another illustration of the effect of the artificial contract of hire-purchase—artificial because, no doubt, both H. and

6 [1919] 2 K.B. 571.

7 In (1953) 16 M.L.R. at p. 48, commenting on *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406 (the " football pool case ").

8 And see *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, *per* Romer L.J. at p. 76; *Fribance* v. *Fribance* (No. 2) [1957] 1 W.L.R. 384, *per* Denning L.J. at p. 387.

W. (and, probably, the car dealer [9]) thought that they were *buying* the car. We have in recent months seen many odd and unforeseen results of the hire-purchase contract. This case may not be the oddest; it must surely be one of the least foreseen.

Aubrey L. Diamond.

Damages for Breach of a Hire-Purchase Contract

Although the judgment of the Court of Appeal in *Yeoman Credit Ltd.* v. *Waragowski* [1] occupies only four pages in the *Weekly Law Reports*, the decision raises important points of law.

The defendant entered into a hire-purchase agreement with the plaintiffs in January 1959 for the hire of a van. Of the hire-purchase price of £434 7s.,[2] £72 was paid immediately by the defendant, and the balance (less £1) was payable in thirty-six monthly instalments of £10 0s. 9d. The remaining £1 was payable at the end of the hiring period, if the option to purchase was exercised.

Clause 7 of the agreement provided:

> " Should the hiring be terminated by the hirer or the owner then the hirer shall forthwith pay to the owner damages for breach hereof (if any) and either (a) such further sum as with the total already paid by the hirer by way of first payment and rentals shall equal one-half of the hire-purchase price as agreed compensation for the depreciation of the goods or at the option of the owner (b) the amount of rentals and other moneys then already due thereunder together with such further sums as would if the hiring had not been terminated have been payable in respect of rent during the period (if any) between the termination of the hiring hereunder and the return of the goods to the owner."

The defendant took delivery of the van, but failed to pay any of the monthly instalments due thereafter. On July 18, 1959, the plaintiffs terminated the hiring, and on July 21, 1959, they resumed possession of the van and subsequently resold it for £205.[3] After the sale the plaintiffs brought an action in the High Court claiming under clause 7 (b) of the agreement £60 4s. 6d., the rentals due up to July 6, 1959, and also claiming under the main part of clause 7

[9] Possibly even the hire-purchase corporation: *cf. Lowe* v. *Lombank Ltd.* [1960] 1 All E.R. 611, *per* Diplock J. at p. 617.

[1] [1961] 1 W.L.R. 1124. Also reported at [1961] 3 All E.R. 145.

[2] Not £434, as the report states in error at p. 1125: see judgment at p. 1127.

[3] Although the master found that this was the best price obtainable in all the circumstances, it is suggested that, apart from other possible factors, additional losses are frequently incurred through repossessed goods being sold—by auction or otherwise—for cash rather than being relet on hire-purchase terms. Obviously the latter method is more advantageous from the hirer's point of view. For the American approach to the realisation problem, see the Uniform Commercial Code, s. 9–504 (3) and Gilmore in (1951) 16 *Law and Contemporary Problems*, 27 at pp. 40, 43–44.

damages for breach of contract.[4] Why they chose this course of action is not clear. It may have been because if they had proceeded under clause 7 (a) they would have been left with an unrecoverable deficiency of £11 3s. 6d.[5] On the other hand, the uncertainties of the legal position concerning the minimum payment clause may have been the motivating force.

On December 30, 1959, Master Grundy gave judgment for the plaintiffs for £60 4s. 6d., and for damages to be assessed. These were assessed in due course by Master Lawrence at £90 3s. 6d. He arrived at this figure by calculating the difference between the full hire-purchase price (less the £1 on the option to purchase) of £434 7s. and the sum of the resale price of the van, £205, the cash deposit of £72, and the amount of the judgment for the arrears of rentals. In other words, he used the method which is appropriate for calculating damages in a straightforward agreement for the sale of goods.[6] The question on appeal, therefore, was whether this approach was correct. The Court of Appeal unanimously held that it was.

Three arguments were presented to the court. The first, for the defendant, was that the plaintiffs had failed to show any damages at all, and that they were really claiming damages for the non-payment of money, the rentals in arrears. To support these propositions counsel apparently relied on a well-known passage in the judgment of

[4] The court did not question their right to do so, but it is suggested that the words "the hirer shall forthwith pay to the owner damages for breach hereof (if any)," read in the light of the whole agreement, refer not to a claim by the owner for the loss of the whole contract, but to a breach of specific covenants, such as the repairs and maintenance covenant common in hire-purchase agreements. Three reasons support such an interpretation. First, the presence of the qualifying words, "if any." Secondly, the fact that clause 7 applied both where the hiring was terminated by the hirer and where it was terminated by the owner: a claim for general damages could only be supported in the latter event, but one for breach of, say, the repairs covenant would be equally applicable in both situations. Thirdly, because if the plaintiffs' interpretation is correct, sub-clauses (a) and (b) would be largely superfluous, since, in the light of the present decision, the owner, on terminating the agreement, would be able to recover his full loss by suing under the main part of clause 7. Having said all this, however, it should be added that it does not follow that the plaintiffs had no right to claim general damages. They did have the right, not because of clause 7, but because the right is derived from the common law and is not dependent on the parties' agreement.

[5] Or £12 3s. 6d. if the final £1 payable on the exercise of the option to purchase is included. The surmise and the calculations are the writer's, not the court's. In making the calculation no allowance has been made for the unearned portion of the finance charge. The point is dealt with in the next note.

[6] See s. 50 of the Sale of Goods Act. Master Lawrence appears to have made no allowance for the unearned portion of the finance charge of £74. It is submitted that he should have done so by using the so-called Rule of "78," after allowing for the profit element in the unearned portion (usually approximately one-fifth) of the charge. See further, "The Rebate Question." (1961) 105 S.J. 394. S. 15 (1) (*c*) of the Australian Uniform Hire Purchase Bill, which has now been adopted by all the states, deals expressly with this problem. See also *Interoffice Telephones Ltd.* v. *Robert Freeman Co., Ltd.* [1957] 3 W.L.R. 971, esp. at p. 974 (C.A.).

Salter J. in the unreported case of *Elsey* v. *Hyde*.[7] The court, however, rejected the argument. "It seems to me," said Davies L.J., who delivered the only reasoned judgment, "that the circumstances here are entirely different from the case where there has been a failure of an obligation to pay money. This was not merely the failure of an obligation to pay money. The defendant had agreed to hire this vehicle, and, subject to his right to terminate the agreement lawfully by notice, in which event certain results would ensue, to pay the sums that I have mentioned over a period of three years."[8] If one may venture to put the answer in another form, counsel's argument would only have been tenable if the defendant had had the right to terminate the agreement at any time without paying anything more than the rentals in arrears. Here, of course, he had no such right.[9] Davies L.J. thought that *Elsey* v. *Hyde* was distinguishable because of the wording of the minimum payment clause in that case, but it is suggested that the better explanation is that in the passage of his judgment on which counsel relied Salter J. was not directing his mind at all to the question whether the hirer was entitled to terminate the agreement at any time without further payments on his part.

Defendant's counsel argued, in the further alternative, that the plaintiffs' claim was really a claim for depreciation, and that as the owners had elected not to proceed under clause 7 (a), they could not now claim depreciation by the back door. The court also rejected this contention. As Davies L.J. pointed out, the fact that the van fetched only £205 six months or so after it had been bought by the plaintiffs from the dealer for £360 did not prove that it had depreciated to the extent of the difference in the interval: the vehicle might only have been worth £250 or less at the beginning. In any event, as has already been noted, the damages which were awarded by Master Lawrence and the amount which the plaintiffs would have been entitled to recover had they proceeded under clause 7 (a) were not the same.

This brings us back to the original question. What damages *could* the owners prove that they had suffered? Davies L.J. thought

[7] Jones and Proudfoot, *Notes on Hire Purchase Law*, 2nd ed., p. 107 at p. 113. The passage in question reads as follows: "Then there is a third case I take, and that is this one, where the hire is determined by the owner, because the hirer is in arrear with his payments. It is proved that this is a breach of this contract, and it is proved that that breach, apart from any termination of the hirer (*sic*), would give the owner a right to damages against the hirer. But what would those damages be? They would be interest on the amount unpaid and nothing more. The fact that the hirer is in arrear with his payments will not entitle the owner to any damages for depreciation of these things. The reason that they have suffered is that they have second-hand goods put on their hands before they have received very much money in respect of them. That is not the result of the hirer's breach of contract, in being late in his payments, it is the result of their own election to determine the hiring . . . ."

[8] [1961] 1 W.L.R. 1124 at p. 1128.

[9] *Cf. Universal Guarantee Pty. Ltd.* v. *Carlile* [1957] Victoria L.R. 68 at p. 77.

that the following proposition contended for by the plaintiffs was sound in law and unassailable, and he adopted it [10]:

> " He [the hirer] agreed over a period of three years to make us payments totalling £433 7s. He chose to pay us nothing apart from the £72. He did not exercise his right to terminate the contract. He broke it. As a result of that, instead of receiving that sum of money, we have, by selling the car, by suing him and getting judgment, received that sum of money less £96 2s. 6d., and that is our damage."

With respect, this reasoning is unsound for the following reasons. It is well-established law that " Where a man is bound by covenants to do one of two things, and does neither, then in an action by the covenantee, the measure of damages is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee," [11] or, as it was put in more general terms by Maule J. in *Cockburn* v. *Alexander*,[12] " Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant." This rule, which appears to be absolute in character,[13] was expressly approved by a strong Court of Appeal in *Withers* v. *General Theatre Corp.*,[14] and has been applied both in Chancery and at common law in a variety of circumstances.[15] It has not, so far as the writer is aware, so far been applied in a hire-purchase situation, but the possibility of its arising with respect to a lease was anticipated by Scrutton L.J. in *Withers*' case. After referring to cases in which the rule had been applied, the learned lord justice continued [16]:

> " Those two cases [17] appeal to my mind because they both happen to have been cases of charterparties, but Romer L.J. says the case which appeals to him is that of a lease for 7, 14 or 21 years which is wrongfully determined at the end of 5 years by the landlord. On what basis are damages to be assessed?

[10] Note 6 at p. 1129.
[11] *Robinson* v. *Robinson* (1851) 42 E.R. 547, *per* Cranworth L.C. at p. 551.
[12] 136 E.R. 1459 at pp. 1468–1469.
[13] *Cf.* Scrutton L.J. in *Withers* v. *General Theatre Corp.* [1933] 2 K.B. 536 at p. 551: " A jury ought not to be asked to award damages on what the plaintiff *might* have expected, but they ought to have been told that the question was what would be the most beneficial performance of the contract to the defendants, and that the damages could not exceed a basis calculated upon that. . . ." (Italics added.) " Beneficial " in this context is used in the same sense as " least burthensome."
[14] [1933] 2 K.B. 536.
[15] *e.g.*, *Robinson* v. *Robinson*, *supra* (trustee failing to invest in either of two modes equally lawful by the terms of the trust instrument); *Kaye Steam Navigation Co., Ltd.* v. *W. & R. Barnett, Ltd.* (1932) 48 T.L.R. 440 (option with charterparty as to port of discharge); *Withers* v. *General Theatre Corp. Ltd.*, *supra* (option with defendants to transfer artist's engagement from the London Palladium to any other music hall owned by them).
[16] [1933] 2 K.B. 536 at p. 549.
[17] *viz.*, *Cockburn* v. *Alexander*, *supra*, and *Kaye Steam Navigation Co.* v. *Barnett*, *supra*.

> Answer: On the basis that the landlord can determine the lease in 7 years, and therefore the plaintiff can only recover damages on the assumption that he had only 2 more years of the lease to run."

Obviously, from the point of view of damages, there is no difference in principle between a lease and a hire-purchase agreement and the right to claim damages of the owner in a hire-purchase agreement as compared with that of the tenant in Lord Justice Scrutton's example.

The further question then arises, does it make any difference that the hirer has not in fact exercised his right to terminate the agreement before the owner does so? Davies L.J. in the instant case appears to suggest that it does, but, with respect, both principle and precedent are opposed to such a suggestion. In the first place, the general rule would be meaningless if it was subject to this exception, since, *ex hypothesi*, the rule can only apply where the defendant has not yet made his election. Secondly, the general principle of damages is that the plaintiff shall be compensated for the defendant's neglect to meet his obligations; hence one must inquire what those obligations were. How, it may be asked, can obligations whose scope is fixed by the terms of the original contract be affected, one way or the other, by the fact that the defendant has breached his contract? Surely they are the same throughout? Thirdly, the suggested exception was expressly rejected by Scrutton L.J. in *Withers*' case. He said [18]:

> " Mr. Doughty [counsel for the plaintiff] says that inasmuch as the management has not in fact exercised the option that clause can have no effect. As some of the earlier cases show, it is not what in fact happens but what might happen, as the performance of the contract by the defendant, that is to decide the matter."

In the light of these considerations it is respectfully submitted that the Court of Appeal in the instant case erred in affirming Master Lawrence's assessment. The agreement gave the defendant the option of terminating the agreement before one-half of the hire-purchase price had been paid upon making good the difference, or waiting until his payments equalled one-half of the hire-purchase price and then terminating, or of completing the rental payments and then exercising the option to purchase. Hence the learned master should have held an inquiry to determine which of these alternatives would have been least burdensome from the defendant's point of view.

Unfortunately, neither the general rule nor the above authorities appear to have been drawn to the court's attention,[19] and the

[18] [1933] 2 K.B. 536 at p. 550.

[19] The report indicates (at p. 1126) that, apart from the cases cited in the judgment, only one other case was referred to in argument, namely, *Campbell Discount Co., Ltd.* v. *Bridge* [1961] 2 W.L.R. 596 (C.A.).

question therefore arises to what extent *Yeoman Credit Ltd.* v. *Waragowski* [20] is a binding precedent. Lower courts will presumably feel bound to follow it, but on the strength of the *per incuriam* [21] doctrine a later Court of Appeal should be free to review the decision. Until this happens, what will be its practical effect? Possibly twofold. On the one hand, only in the exceptional case will the owner be able to recover a higher sum by resorting to the Waragowski formula than by relying on his right to claim a fixed proportion of the hire-purchase price under the minimum payment clause.[22] On the other hand, owners who wish to avoid the uncertainties of the clause may prefer to sue for the deficiency in the hire-purchase price in accordance with this decision. Such a result would be by no means undesirable—provided it is consistently applied. Hire-purchase agreements are only concealed conditional sales, and the assimilation of the two security devices is very much overdue.[23] It is curious to find, however, that the Court of Appeal should have linked the two forms of agreements only so soon after it reiterated the differences between them in *Yeoman Credit Ltd.* v. *Apps.*[24] Another, less desirable, result may be that owners will now have the choice of suing for general damages or claiming a fixed sum under the minimum payment clause. It would be unfortunate if this pessimism were justified, since in that event the owner will be getting the best of both worlds.

JACOB S. ZIEGEL.

LIABILITY FOR NEGLIGENT MISSTATEMENTS

WITH praiseworthy agility Salmon J. recently has been evading the clutches of *Candler* v. *Crane, Christmas.*[1] Two propositions were put forward by the majority of the Court of Appeal in that case: first, there is no liability in tort for negligent misstatements, and, secondly, there is no liability in tort for economic or pecuniary loss as opposed to damage to the person or property. In the past ten years a great deal of academic writing has attempted to show that these two propositions are too wide to constitute the true *rationes decidendi* of the case, but until recently the courts have not been called upon to consider the question.

20 [1961] 1 W.L.R. 1124.

21 The doctrine applies to those decisions "given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong": *Morrelle Ltd.* v. *Wakeling* [1955] 2 Q.B. 379, *per* Evershed M.R. at p. 406.

22 Even in the present case, if an allowance had been made, as it is suggested in note 6, *supra*, it should have been, for the unearned portion of the finance charge, the amount recoverable under the formula would have been less than under clause 7 (a).

23 See the writer's "Hire-Purchase Agreements: A plea for Greater Realism" (1960) 104 S.J. 996.

24 [1961] 1 W.L.R. 94.

1 [1951] 2 K.B. 164 (C.A.).

In *Clayton* v. *Woodman & Son (Builders), Ltd.*[2] the plaintiff, a bricklayer, was employed by a firm of builders (the first defendants) who were installing a lift in the hospital of the second defendants. The third defendants were a firm of architects engaged by the hospital to prepare specifications and supervise the construction of the lift. B., an architect employed by the third defendants, negligently gave the plaintiff certain instructions on the site, as a result of which a stone gable collapsed and injured the plaintiff.

The plaintiff's action against his employers succeeded easily since it was held that they were negligent in not taking certain elementary precautions for the safety of their workman. The action against the architects, however, was more difficult, for they sought to shelter behind *Candler* v. *Crane, Christmas.* Salmon J. would have none of this. In his view the cases on negligent misstatement were not relevant since " orders and instructions are different in their nature from mere statements or representations. To make a statement or representation believing that someone will probably act on it is not . . . equivalent to issuing orders or instructions which one knows will certainly be obeyed." Thus the architects were liable. Even if this distinction was not valid, Salmon J. was still not prepared to submit to *Candler* v. *Crane, Christmas.* In that case the damage complained of was financial,[3] whereas *Donoghue* v. *Stevenson*,[4] the mother of the modern law of negligence, has only been applied where the damage complained of was physical, *i.e.*, to person or property.[5] After a very brief survey of the authorities Salmon J. concluded that *Candler* v. *Crane, Christmas* does not apply to careless statements causing *physical* damage, and did not protect the architects, who were liable under the general principles of *Donoghue* v. *Stevenson.* The learned judge realised that to draw a distinction between the different types of damage flowing from negligent misstatements was to add " illogicality to illogicality, but that seems to me to be preferable to enlarging the class of those to whom a remedy is unjustly denied." [6]

The principal ground for holding the architects liable under *Donoghue* v. *Stevenson* was that the negligent instructions had been given directly by the architect to the plaintiff. Curiously, Salmon J. stated that if the architect's negligent advice had been given to the plaintiff's employers, who as a result had themselves given instructions to the plaintiff, the architects would not have been liable.

[2] [1961] 3 All E.R. 249. Also reported at [1961] 3 W.L.R. 987.

[3] The plaintiff made a disastrous investment in a company after he had inspected accounts negligently prepared by the company's accountant, with whom he had no contractual relationship.

[4] [1932] A.C. 562.

[5] Whether or not damages can be recovered in negligence for economic loss only is a more open point than Salmon J. suggests. There is slight authority for allowing such a claim in *Morrison* v. *Greystoke Castle* [1947] A.C. 265. See Street, *The Law of Torts*, 2nd ed., pp. 110–111.

[6] It is a pity that Salmon J. did not bolster up this argument by citing *Sharp* v. *Avery* [1938] 4 All E.R. 85 where the Court of Appeal appear to have awarded damages for physical injuries arising as a result of a negligent misstatement.

" The [employers] would in such circumstances have been interposed between the instructions and the doing of the work, and the proximity between the plaintiff and [the architects] would not have been sufficiently close to impose any duty of care on them." With respect, this is difficult to understand, since the essence of liability under *Donoghue* v. *Stevenson* is that there need not be necessarily a direct contact between the plaintiff and defendant. In such circumstances the architects should still be liable if it could reasonably be foreseen that the architects' advice would be relied upon.

Earlier Salmon J. had been faced with a situation where *economic* damage flowed from a negligent misstatement. In *Woods* v. *Martins Bank* [7] a bank manager employed by the defendants gave negligent investment advice to a potential customer as a result of which the potential customer suffered severe financial loss. This appears to fall within the scope of *Candler* v. *Crane, Christmas*, but Salmon J. had no difficulty, in the particular circumstances, in giving the plaintiffs a remedy by holding that, apart from any contractual relationship, there was a fiduciary relationship between the bank manager and the potential customer.[8]

These two first-instance decisions of Salmon J. assist considerably in containing *Candler* v. *Crane, Christmas* within narrower bounds than was at one time feared. The situation, at present, may be summarised thus:

General Principle—There is no liability for innocent (*i.e.*, not fraudulent) negligent statements (*Candler* v. *Crane, Christmas*, subject to review by the House of Lords).

Exceptions—But there may be liability for negligent statements,

(a) If there is a contractual relationship between the parties.

(b) If the loss suffered is physical as opposed to financial (*Clayton* v. *Woodman & Son*).

(c) If the loss, although financial, is attached to a claim in connection with physical damage (*quaere*).

(d) If there is a " fiduciary " relationship between the parties, whether the loss is physical or financial (*Woods* v. *Martins Bank*: there may well be great scope for developing the concept of a fiduciary relationship in tort so that many of the harsh cases where economic loss is suffered as a result of negligent misstatements can come within this field).

It may take some time before the House of Lords is called upon to consider *Candler* v. *Crane, Christmas*, but until such time it is to

[7] [1959] 1 Q.B. 55.

[8] There is no reference to this in the reports in [1958] 1 W.L.R. 1018 and [1958] 3 All E.R. 166, but mention of the fiduciary relationship appears in [1959] 1 Q.B. at p. 72. *Candler* v. *Crane, Christmas*, although mentioned in argument was not referred to by Salmon J.

be hoped that the attitude of Salmon J. towards the case is followed by his brother judges.

Gerald Dworkin.

Standard of Proof in Rectification

From time to time judges have said that a party seeking rectification must prove his case " beyond reasonable doubt." A recent instance of this is in the judgment of Pennycuick J. in *Roberts* v. *Leicestershire County Council* [1] where the learned judge said [2]: " It is well established that a party claiming rectification must prove his facts beyond reasonable doubt. . . ." The question whether these expressions require that the criminal standard of proof should be satisfied for rectification was squarely raised in the recent case of *Earl* v. *Hector Whaling* [3] and all three members of the Court of Appeal (Holroyd Pearce, Harman and Davies L.JJ.) were agreed that, though strong evidence is required, the county court judge, who had expressly said that the criminal standard obtained, had, as Davies L.J. put it, fallen into " an error in terminology." [4]

The plaintiff, a seaman employed on the defendants' whaling ship, contended that he was entitled to a guaranteed seven months' pay in accordance with a printed term in his contract of employment even though the voyage in respect of which the claim was made had not lasted five months. The defendants, *inter alia*, replied that it had been orally agreed before the plaintiff was engaged that he was not to have the benefit of the guarantee and the term relating to it had been included in the written contract as a result of a common mistake. Hence they asked that the contract be rectified. The county court judge in holding for the plaintiff said in regard to the claim for rectification that the onus on the present defendants was " no less than that which rests on the prosecution in a criminal case." [5] The appellant defendants maintained that this was a wrong view of the law.

The fullest examination of the problem was undertaken by Holroyd Pearce L.J. As might have been expected, he referred to *Hornal* v. *Neuberger Products* [6] and cited a passage from the judgment of Hodson L.J. in that case to the effect that there is " in truth no great gulf fixed between balance of probability and proof beyond reasonable doubt " and that the measure of probability was involved in the question of proof beyond reasonable doubt.[7]

Holroyd Pearce L.J.'s own conclusion in regard to the standard in rectification is stated in the following paragraph [8]:

[1] [1961] 2 W.L.R. 1000. See also *per* Simonds J. in *Crane* v. *Hegeman-Harris* [1939] 1 All E.R. 662 at p. 665: " beyond all reasonable doubt."
[2] [1961] 2 W.L.R. at p. 1009.
[3] [1961] 1 Lloyd's Rep. 459.
[4] *Ibid.* at p. 470.
[5] *Ibid.* at p. 464.
[6] [1957] 1 Q.B. 247.
[7] *Ibid.* at p. 262.
[8] [1961] 1 Lloyd's Rep. at p. 468.

> " In my view the matter is largely one of words. It is obvious that when parties put their hands to an agreement, it will take convincing evidence to show that the agreement does not contain the intended bargain. For in such a case there must be enough weight in the evidence to outweigh the inherent probability that they meant what they wrote. It is a question of fact and degree what weight of evidence is needed to overcome that inherent probability, and to establish that, contrary to it, the parties did not mean what they wrote. Such evidence would normally have to be very strong. It cannot be regarded as sufficient merely because it would, on a balance of probabilities, establish an oral agreement. It must be strong enough to overcome the fact that the parties signed a different agreement."

Although it has been cogently argued that there may be a difference of substance between the two standards of proof when put in terms of the effect to be given to doubt in the minds of those prepared to accept evidence,[9] it is suggested that in rectification there can be in practice little difference. Whatever may be the case in other matters, the strong insistence of the courts that only the clearest of evidence will be accepted must render any difference minimal. This seems to be underlined by the fact that though Harman L.J. in the present case said [10] that he thought that the county court judge had used " an unfortunate phrase " in speaking about criminal standards of proof the learned Lord Justice went on to approve " beyond reasonable doubt " as a correct description of the standard to be attained, saying:

> " it does not seem to me that he went wrong at all in holding that he must be very well satisfied, or satisfied beyond reasonable doubt, or whatever phrase you use to show that you will not rectify unless you are satisfied to that degree."

Another point of interest in *Earl* v. *Hector Whaling* is that Harman L.J. expressly said [11] that he differed from the view taken by Denning L.J. in *Rose* v. *Pim* [12] that for rectification a prior contract is needed. Harman L.J. said that he agreed with the view of Clauson J. in *Shipley U.D.C.* v. *Bradford Corp.*[13] and Simonds J. in *Crane* v. *Hegeman-Harris* [14] that a prior common intention is enough. It will be recalled that in the relevant passage in his judgment in *Rose* v. *Pim* Denning L.J. first made the point that in a rectification case the courts " do not look into the inner minds of

[9] See *Cross on Evidence*, p. 116 and (1951) 14 M.L.R. 417, n. 35 (Prof. Coutts), there cited: " Normally, in a civil case account must be taken of a doubt only if it results in a rational opinion that a fact in issue is less likely than not, whereas in a criminal case account must be taken of a doubt if it results in a rational opinion that the contradictory of the issue is more than a remote possibility."

[10] [1961] 1 Lloyd's Rep. at p. 470.

[11] *Ibid.*

[12] [1953] 2 Q.B. 450 at p. 461.

[13] [1936] Ch. 375.

[14] [1939] 1 All E.R. 662 at p. 664.

the parties " and then went on to say that whilst it was not necessary that all the formalities of the prior contract should have been executed so as to make it enforceable at law there must have been a concluded contract. He expressed disapproval of *Crane* v. *Hegeman-Harris* in so far as it suggested that a continuing common intention which did not find expression in outward agreement could be enough. Unfortunately Harman L.J. was not really explicit on his grounds for preferring " common intention " to " concluded contract " even if not complete in respect of formalities. He said that in the case before the court the parties had had " a prior common intention " or thought that they had such an intention and then went on to approve the county court judge's decision that the evidence did not carry enough weight for rectification to be granted. Having regard to the facts of *Earl* v. *Hector Whaling*, where it seems that the defendants had orally informed some of the seamen who were signing on that the guarantee of seven months' pay would not apply to them,[15] it may be that Harman L.J. did not mean to suggest that an unrevealed intention would be sufficient for rectification but rather that an intention, common to the parties and manifested and adhered to in the course of prior negotiations, which did not assume the form of a complete agreement until the document to be rectified was executed or a prior intention shown in a " subject to contract " agreement would be a sufficient foundation for the remedy.

Whatever may be the outcome of this conflict of views, the pronouncements of the Court of Appeal on the question of standard of proof lend further weight to the submission of Professor Coutts made ten years ago [16]:

> if some (civil) cases may be established by a preponderance of evidence, other (civil) cases require proof beyond reasonable doubt and other (criminal) cases demand a yet higher degree of proof, a recasting of terminology is an urgent necessity.

A. H. Hudson.

[15] [1961] 1 Lloyd's Rep. at p. 462.
[16] (1951) 14 M.L.R. 411 at p. 424.

REVIEWS

Restitution to Victims of Crime. By Stephen Schafer. [London: Stevens & Sons, Ltd. 1960. ix and 130 pp. 25s. net.]

This is the second volume of the new *Library of Criminology* which is being published by Stevens & Sons. Its scope is rather more limited than the title implies, for it is in actuality a memorandum prepared for the Home Office on the legislation of a number of foreign countries dealing with the subject of what is generally called "restitution" to the victims of crime. This survey is preceded by a short, indeed slight, historical introduction, which, however, does serve the useful purpose of reminding the reader that in primitive systems of criminal law restitution, or compensation, has played a basic part, the object of the legislator being to induce the victim to stay his hand against the offender by providing that the latter shall provide material redress for the victim or his family. It is well known that in the earliest Anglo-Saxon laws such a policy figures prominently. As the state becomes stronger it becomes unnecessary to rely upon this incentive and we find that the restitution principle drops out of the maturing systems of criminal law, the awarding of compensation being left to the civil courts; a point which is underlined in the Report of the Working Party on Compensation for Victims of Crimes of Violence.[1]

This is no doubt a satisfactory theoretical solution of the problem, but practically it has a very limited value, since on the whole criminals are not worth the "powder and shot" which has to be expended in attacking them in civil courts, and even when criminal courts are empowered to make orders against them for compensation these are seldom worth asking for. This must have been realised by the victims at an early period after the conditions of criminal administration had changed, but their grievance appears for long to have attracted singularly little comment. Indeed, it is not till the coming of modern criminology in the nineteenth century that voices begin to be lifted demanding reparation for the victims of crime.[2] Since then there has been a fairly constant, if not very effective, pressure from criminologists to this end,[3] and there can be little doubt that it was largely due to the efforts of Miss Margery Fry in this country that the Home Secretary set up his Working Party to report on the whole problem of compensation in these cases.

Although in commissioning this report from Dr. Schafer the Home Office must have had in mind that it would be useful to their Working Party, or at any rate the report must have been available to them, since the preface to this book is dated July 1960, and the report did not appear until December of that year, the foreign experience set out and examined by Dr. Schafer is not

1 Cmnd. 1406 (1961). See the note on this Report at p. 744.

2 According to Dr. Schafer the first of these is Bonneville de Marsangy in 1847 whose proposals are referred to in Edwin A. Sutherland's *Principles of Criminology*.

3 The ironic comment of M. Prins at the Paris Prison Conference of 1895 is worthy of quotation: "The guilty man lodged, fed, clothed, warmed, lighted, entertained, at the expense of the state in a model cell, issued from it with a sum of money lawfully earned, has paid his debt to society; he can set his victims at defiance; but the victim has his compensation; he can think that by taxes he has paid to the Treasury he has contributed towards the paternal care which has guarded the criminal during his stay in prison."

made use of by them. This may be because their terms of reference were limited to the consideration of Miss Fry's proposals, but even within that rather narrow field some of the foreign legislation is very relevant, and the complete ignoring of it in the report is, to say the least, peculiar.

Dr. Schafer is a Hungarian lawyer with a special interest in criminology[4] who took refuge in this country in 1956. He was obviously given an inadequate amount of time for his unusually wide survey which required him to enlist the help of many foreign embassies, and of criminal lawyers and criminologists living abroad: moreover, he was writing in a language with which he was clearly not altogether familiar. His work is, accordingly, defective both in respect of contents and presentation: nevertheless, considering the handicaps under which he laboured, the report is a useful and helpful piece of work which brings out the difficulties of the problem, and shows that no country has so far succeeded in tackling them successfully.

After his survey of the historical background Dr. Schafer introduces us to the substance of his work in a short chapter on aims and methods. The main points to which he directed his attention were: how far legal rights to restitution exist, and whether they extend beyond actual material injury; what courts have jurisdiction and what are the essential points of procedure in them, particularly, can the criminal courts themselves take cognisance of these matters? how far is an award of damages a punitive element in the sentence? against what assets can the victims enforce their claims?—this from a practical point of view is the very core of the matter, and involves a number of important subsidiary points, particularly that of remuneration for work in prison; and finally, a general survey of how restitution works in practice. These are the points in respect of which the legislation of the various countries covered by the survey is examined.

The survey was world-wide, extending to no less than thirteen areas of the world, in most of which the legislation of at least two states is summarised. In Northern Europe, which is generally considered to be in the lead as regards the solution of penal problems, Dr. Schafer discusses all the four countries situated there, but actually nothing very revolutionary emerges.

Indeed, it may be said in general that in spite of the importance which criminologists have attached to the subject few states have made genuine and substantial efforts to deal with the problem. Many have been content to adopt the so-called adhesion procedures, first apparently worked out in Germany, under which the tribunal which adjudicates upon a criminal charge is given jurisdiction to award civil compensation, thus obviating the need for a dual process. An obvious element in such a procedure is a provision under which the adjudicating criminal court may order the stolen goods or other *corpus delicti* to be returned to the victim, and such provision is found in the legislation of a number of countries which do not adopt the adhesion process, notably the United Kingdom and some of the other states of the British Commonwealth as New Zealand and some Australian states.

The effectiveness of awards made under the adhesion process, or, indeed, under any jurisdiction, depends on the assets of the criminal, which are usually so small that the victim makes little effort to enforce his judgment. Here and there prisoners are enabled to earn substantial wages during imprisonment, and a proportion of these may be made available for compensating their victims. France is one of the few countries where within rather narrow limits such a policy has been adopted: although the victim comes at the end of a long queue of claimants who have priority over him, such as the state which has to be satisfied in respect of its legal costs and the prisoner's maintenance, and when certain personal purchases and payments to his family have been made, the balance may be made available to compensate a victim who has established "his claim to this fraction of the

[4] See his "Some Basic Principles of Hungarian Criminal Law," 22 M.L.R. 164.

prisoner's earnings." Dr. Schafer has the impression that this scheme works "in a relatively satisfactory manner," so that the French can pride themselves on having made some progress in solving this intractable problem. But I must not give the impression that this policy has been adopted only in France: other countries have similar rules, *e.g.*, Finland, though Dr. Schafer is a little ambiguous as to the position in that country, and Turkey, where the policy on prison work appears to be very enlightened. There is also in France a state scheme for the compensation of the victims of motor-car accidents which is peripheral to the subject under examination, and is in any case shared with other countries, though under somewhat varied arrangements.

In most countries prison earnings are little more than token sums, but even where they amount to genuine wages compulsory attachment is not permitted, though in some states, *e.g.*, the German Federal Republic, a prisoner may himself ask to have a fraction of his pay made over to his victim in compensation for the damage caused by his offence. Moreover, in these jurisdictions the "busse" or compensatory fine exists which the victim can demand in the criminal proceedings: here again, however, the problem of the criminal's assets arises. This, in effect, means that the element of restitution is being taken into account in the award of punishment; and such a policy is fairly common in jurisdictions where "busse" are not known, *e.g.*, in some Scandinavian countries, and in a modified form in South Africa.

As one would expect it is not uncommon to find legislative provision under which, if probation orders or the equivalent are made, a term requiring restitution may be inserted in them.

Interesting and apparently unique is the policy adopted by Cuba, which is to establish a national fund for the indemnification of the victims of crime.[5] Criminals who are ordered by the courts to make payments in compensation for their offences pay into this fund, which is also built up from other sources including national subsidies.[6] A criminal without assets may be required to pay up to one-quarter of his monthly income to the fund, or, if imprisoned, a proportion of his earnings may be taken for the same purpose: a contumacious criminal may be forcibly detained for the purpose of discharging his obligations, or as a punishment for his failure, and may then work off his liability to the fund at the rate of three pesos per day.

Another unusual provision is found in Mexico, where the victim's interest is put before that of the state, and must be satisfied out of the criminal's assets before they are used, *e.g.*, to liquidate a fine. Prison earnings are among the assets used for this purpose, and even after he has served his sentence a prisoner's obligation to meet an undischarged adjudication to pay damages will continue. Mexico is one of the few states in which the order for restitution is definitely regarded as part of the punishment, and perhaps comes nearer than any other to meeting the demands of the criminologists in this regard, at any rate among those dealt with in this book.

None of the South American, Asian or Australasian countries discussed have legislation on the points under consideration which calls for comment. The information given about Communistic states is very sketchy, but it appears that in the U.S.S.R., where prison work is remunerated, the wages accruing in respect of it may be made available for the victims of the criminals, subject to limitations such as the right to receive 10 per cent. for their own personal use.

[5] It was, of course, along similar lines that Miss Fry was thinking and it was to making her thoughts viable that the Working Party was instructed to direct its attention.

[6] These are apparently not always substantial enough to keep the fund 100 per cent. solvent.

This part of the volume closes with a useful comparative summary from which it appears that there are very few states [7] which treat the problem of compensation in these cases as entirely a matter for the civil courts.

The Home Office is presumably conversant with the position in the United Kingdom, so Part III which deals with the position there was, perhaps, written for this book. Actually, the position in this country is rather better than is usually recognised, and certainly distinctly better than in some other countries. There was, since early medieval times, a limited possibility of recovering compensation from the hundred for damage to property caused during breaches of the peace, and to a lesser extent for personal injuries sustained in arresting felons.[8] The former still exists, but is now limited to damage caused by rioters, and is regulated by the Riot (Damage) Act, 1886.[9] Dr. Schafer however contents himself with recent developments, commencing with the Probation of Offenders Act, 1907, which introduced the almost revolutionary jurisdiction to order monetary compensation up to £10 as part of a probation order. This power was substantially extended by the Criminal Justice Act, 1948, which permits magistrates to make orders up to £100. Dr. Schafer deals with this very cursorily, but the Committee on Compensation point out that the power is used appreciably by magistrates, though not much in the higher courts which are often less knowledgeable on questions of punishment than the inferior courts which they supervise.[10]

Dr. Schafer says that this is the only case where restitution is dealt with in England within the scope of criminal procedure. This is not correct for, while it may be necessary to enforce the right of compensation arising from riot by civil proceedings, normally the assessment will be made and paid by the police authority under the Statute of 1886; it is worth noting that this right to compensation extends to cover goods stolen from the house or building during the course of the riotous attack on it. Moreover there is also power under the Forfeiture Act, 1870, s. 4, for a court which enters a conviction of felony to award a sum not exceeding £100 as compensation for loss of property resulting from the felony, while under the Larceny Act, 1916, s. 45, on a conviction for larceny the court may order the restitution of the stolen goods, and this extends to cases of embezzlement, extortion, false pretences and fraudulent conversion, *i.e.*, it is not limited to felonies. It is true that there are limitations on this power, but it is a useful one, and is made use of a good deal by criminal courts. What Dr. Schafer is really concerned with in this chapter however is Miss Fry's proposals for a state-scheme of compensation and with the background events which led up to the appointment of the Committee on Compensation for Victims of Crimes of Violence.

[7] One of these is said to be New Zealand (p. 103), but in the chapter on Australasia it is stated that criminal courts in that country have a limited jurisdiction to award compensation (pp. 92–93).

[8] See Radzinowicz, *History of English Criminal Law*, Vol. II, p. 163: Collective Responsibility."

[9] In spite of the fact that there are a number of modern cases in the reports the legal position is not altogether clear. Lord Kenyon held in *Reid* v. *Clarke* (1798) 7 T.R. 496, that the right was limited to cases falling within the Riot Act, 1714, a decision which proved cramping and was overruled by the Statute of 1886. The history of the matter is particularly obscure. It is altogether neglected by Holdsworth in his *History of English Law*, also by Stephen, and dealt with rather cursorily by Radzinowicz (*op. cit.*), who does, however, mention an article by G. W. Hastings in the *Law Magazine and Review*, Vol. 4, N.S. 552, which, without being very illuminating, does refer to a number of nineteenth-century decisions: see also *Wise on Riots and Unlawful Assemblies*, 4th ed. 1907.

[10] See Cmnd. 1406, § 5. Magistrates make such orders in some 11·5 per cent. of the cases which they put on probation. Few of them are said to be personal injuries cases however.

In his Part IV Dr. Schafer makes a number of general observations on the restitutive concept of punishment which however do not take the argument much further than has been implicit in the earlier sections. But his conclusion that the obligation to make restitution, if enforced with understanding, might prove a strong influence in the rehabilitation of prisoners appears to me to be very sound: it is one that has too often been lost sight of.

In conclusion I note the lack of an index, which in a wide ranging book of this kind is a very serious omission. May the shade of Thomas Carlyle haunt the publisher!

C.

Essays in Constitutional Law. By R. F. V. Heuston, M.A., Fellow of Pembroke College, Oxford, of Gray's Inn and King's Inns, Dublin, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1961. x and 187 pp. 42s. net.]

In this book, based on a course of lectures, Mr. Heuston selects some of the most important topics in Constitutional Law and expounds them to the student in a stimulating and even entertaining way. Emphasis is placed on common law principles rather than statute or convention, and on Constitutional Law proper as distinct from Administrative Law. The topics chosen are Sovereignty, the Rule of Law, the Royal Prerogative, Parliamentary Privilege, Personal Liberty, Civil Disorder, and Judicial Control of Powers.

There is not space in a review to comment fully on all the controversial points raised in the experimental chapter on Sovereignty. To attribute the doctrine of parliamentary sovereignty to Oxford dons is to ignore a number of *judicial* statements that support it. The fact that there is no judicial *decision* in point merely indicates that no party or counsel since the Revolution has thought it worthwhile to argue the principle in court. Counsel went furthest in the *Ellen Street Estates* case, but did not impress the Court of Appeal. That Sovereignty as discussed by lawyers is a legal concept can hardly be part of a "new view." Austin presumably regarded it as a juristic concept, and Bryce distinguished it from political power. It is true that dicta in various parts of the Commonwealth in recent years have led us to distinguish more clearly between (a) composition, (b) procedure and (c) substantive law-making power ("area of power" is ambiguous). The value of this is to bring out the fact that there must be some minimum requirements of composition and procedure before the courts can say "this is an Act of Parliament." But it is misleading to say that the courts have jurisdiction to question the "validity" of an alleged Act of Parliament on the grounds of composition and procedure. These minimum requirements concern authenticity and not validity. And how does one categorise questions, *e.g.*, the requirement of a referendum, into "composition" or "procedure"? Incidentally, Mr. Heuston corrects the freshman's mistake that the Queen signs Bills, but he perpetuates the error that the number of readings is prescribed by Standing Orders. The availability of the injunction in relation to the royal assent is doubtful, and the use of the declaratory judgment in this context probably much more limited than Mr. Heuston suggests. Sir Owen Dixon's second thoughts are cited, but not disclosed, in a footnote. If both Houses sat together, it is questionable that the courts would be affected by "the constitutional rights of the subject." The practice since the time of Edward III has been for the Commons to withdraw from the Parliament Chamber to deliberate separately, and to come together again for the signification of the royal assent. The matter seems now to be one of the Commons' privileges and of constitutional convention. If it is one of the Lords' privileges also, a lot would go on in Parliament before a joint meeting could be held. Would the courts want to be involved in all this?

Substantive law-making power has always been the main theme of the doctrine of parliamentary sovereignty, and in spite of dicta in *MacCormick* v. *Lord Advocate* it appears to me to remain unshaken. *MacCormick's* case was not a decision [*sic*] denying the law-making power of Parliament in repugnance to the Union with Scotland. Since it was held that neither the Treaty of Union nor the Royal Titles Act was relevant, and further, that the petitioners had no legal title or interest to sue, anything else said was *obiter*. As for composition and procedure, the cases cited from the Irish Free State (*O'Brien*), New South Wales (*Trethowan*) and the Union of South Africa (*Harris*) are of great interest for comparative constitutional law, but their applicability to the United Kingdom Parliament can only be described as speculative. In each case the legislature was bound by a higher statute, and was subject to a recognised system of judicial review. If we must not stretch *Wauchope's* case too far—and Lord Campbell's complete dictum is very wide—the same may be said for *Harper* v. *Home Secretary*, which was concerned with delegated legislation, and *Bilston Corporation* v. *Wolverhampton Corporation*, which was concerned with activities outside Parliament. We have not hitherto been asking "the wrong sort of question," but different—and some think less important—questions are now fashionable.

Except in the first chapter on Sovereignty, Mr. Heuston displays an excellent sense of balance. Special features are familiarity with Irish cases (persuasive for English law, presumably), and a deft use of D.N.B. A broad survey traces the Rule of Law from Bracton and Coke through Dicey to Delhi, though perhaps its non-legal nature might have been stressed rather more. Mr. Heuston puts the Royal Prerogative in proper perspective in relation to statutory powers, without minimising it as some modern writers do by way of reaction against its former exaggeration. He values more highly than some recent authors the responsibility of Ministers to Parliament as a check on the manner in which the prerogative is exercised. I do not see, by the way, how *China Navigation Co.* v. *Attorney-General* reaffirms the principle of *Darnel's* case. The chapter on Parliamentary Privilege, containing a full and vivid account of the *Stockdale* v. *Hansard* litigation, is well done; but I was disappointed by the conclusion, for a discussion of the committal of strangers for contempt ought to refer to *Kielley* v. *Carson*, which shows that this power of the House is a historical anomaly and is not necessary for the protection of a legislature, as even Erskine May admits. In the chapter on Personal Liberty the section on habeas corpus includes the substance of Mr. Heuston's prophetic article in the *Law Quarterly Review*, into which are incorporated references to the *Hastings* cases and a note on the reform of the law by the Administration of Justice Act, 1960. The chapter on Civil Disorder owes much to the Irish troubles. Here Mr. Heuston points out that the offence of wilfully obstructing (as distinct from assaulting) the police—the charge brought in *Duncan* v. *Jones* —was not created by statute until after the decision of *Beatty* v. *Gillbanks*.

The last chapter on Judicial Control of Powers is not intended to be more than an outline, because much has been written about Administrative Law in the past twenty years, and Mr. Heuston suggests that sound solutions ought to be based on common law traditions. He thinks the problem of administrative tribunals has been greatly exaggerated, and also draws attention to the small number of applications for prerogative orders in any one year. On delegated legislation, he says it is often easier to find a statutory instrument than a judicial precedent, and he points out that questions concerning *vires* seldom arise nowadays. So unemotional an attitude towards this subject is rare. There is an unbiased explanation of *Liversidge* v. *Anderson* such as one seldom gets of this case, though Mr. Heuston might have mentioned that the Home Secretary was required by the Regulation to report to Parliament once a month—this was not merely a matter of convention. When he says that "a public authority cannot enter into a contract which will hamper it in

the exercise of its statutory duties," does he regard such a contract as void for incapacity? or voidable by the public authority? or not specifically enforceable against it, leaving open the question of compensation? The "suggestions for reform" at the end are rather too summary, for they do not bring out clearly the distinction between unlawful acts and maladministration not amounting to illegality.

The whole book is lively and refreshing, and will be deservedly popular with students.

O. Hood Phillips.

The Constitutional Structure of the Commonwealth. By K. C. Wheare, f.b.a., Rector of Exeter College. [Oxford: at the Clarendon Press. 1960. xiv and 201 pp. 25s. net.]

Dr. Wheare's standard work on *The Statute of Westminster and Dominion Status* ran through five editions in the days when it was still appropriate to analyse Commonwealth relations in terms of rules of strict law and formally enunciated constitutional conventions. He has now produced its successor. It is not, of course, a book about the constitution of the Commonwealth, for that is certainly one constitution which does not exist. It deals only peripherally with the constitutions of individual Members of the Commonwealth. It deals essentially with the rules and usages regulating the status and interrelationship of independent countries within the Commonwealth. And it deals with them in Dr. Wheare's own inimitable style—always lucid, often repetitive yet remarkably succinct—objectively and judiciously, with difficult jurisprudential concepts marching with homely metaphors in orderly array.

Inevitably the text includes a good deal of 1931 and all that. The chapters on Equality and Autonomy contain much that is familiar, but nowhere will one find a meatier exposition of the relevant rules and conventions. Since a good deal of recent Commonwealth constitutional history has to do with the dextrous manipulation of verbal formulas, there are chapters on Vocabulary and Symbols, the symbols being the Crown and the Queen in her several capacities. There is also a short survey of Co-operation between Members of the Commonwealth. For most readers, however, the special centres of interest will be the chapters entitled Autochthony and Membership. Constitutional autochthony implies the adoption of a home-grown constitution, rooted in native soil. Put in juridical terms, it calls for the establishment of a local *Grundnorm* for the legal order. To Dr. Wheare, autochthony in its pure form is achieved only when the constitution cannot be said to derive its validity directly or indirectly from the United Kingdom Parliament. A formal breach in legal continuity must therefore be made. Eire undoubtedly achieved autochthony by virtue of the procedure followed for the introduction of its 1937 Constitution. India's claim to membership of this new club is also a strong one, for its republican Constitution never received the royal assent which was probably requisite in terms of the Indian Independence Act, 1947, and yet the Constitution is unquestionably the highest law of India. Pakistan's 1956 Constitution, on the other hand, fails to qualify, and if Dr. Wheare had finished writing his book a year later he would have been obliged to plough Ghana and (if it had remained within the Commonwealth as a republic) South Africa too. He concedes that the Federation of Malaya is a marginal candidate. Nevertheless, the fact is that in every Commonwealth country which has become independent since 1945 the courts would reject any suggestion that the United Kingdom Parliament had any hierarchical superiority over the local Parliament which would entitle it to legislate for the new Member without that Member's consent, and in most of those countries the courts would probably deny that there were any circumstances at all in which new United Kingdom legislation would have the force of law *ex proprio vigore* in the local system. Whether they "ought" to take such an attitude would become a live

issue only if the matter came before the Judicial Committee of the Privy Council; and in recent years the Judicial Committee has not shown itself to be unaware of political realities. The decisive factor nowadays is the granting of independence, whereupon the local legal order finds autochthony thrust upon it by the facts of life. The fate of the new state's first constitution will be of interest to constitution-mongers everywhere, but what happens (and how it happens) is unlikely to be of fundamental jurisprudential importance.

In his chapter on the acquisition and loss of full membership of the Commonwealth Dr. Wheare has been ill served by the march of events. He observes (at p. 124) that although existing Members have to be consulted before a new Member can be admitted, nothing has ever been laid down about the need to obtain their consent. But the communiqué issued after the meeting of Commonwealth Prime Ministers in 1960 spoke of South Africa's prospective request for the "consent" of the other Commonwealth governments to the continuance of its membership, and the same rule must obviously extend to new applications for membership. This does not, of course, explain what the answer is to be if the Members are divided in their opinions, and on this point Dr. Wheare's analysis is admirable. One is surprised, however, not to find any express mention of the difficulties that might arise if South Africa were to seek to become a republic within the Commonwealth, for this was a predictable possibility at the time when the book was written. And Dr. Wheare's doubts "whether in fact existing Members have the right strictly speaking to expel another Member" (p. 127) were not shared by a number of independent critics or by some Members of the Commonwealth in 1961.

On a great many aspects of the formal structure of Commonwealth relations this will rightly be regarded as a work of authority. Nobody but Dr. Wheare could have achieved such a *tour de force* in a mere 169 pages. (The remainder of the text consists of selections from the main constitutional statutes.) One closes the book wondering why he was not asked to write the official exposition of the recent constitutional proposals for Northern Rhodesia.

S. A. de Smith.

Atlantic Democracy: A comparison of the Constitutions of the North Atlantic Treaty Organisation Member States. By C. d'Olivier Farran. [Edinburgh: W. Green & Son, Ltd. 1957. ix and 203 pp. 25s. net.]

In 1956 Dr. Farran was awarded one of the first NATO Research Fellowships, and this little book is the product of his resulting research work. Lord Ismay, a former Secretary-General to the North Atlantic Treaty Organisation, has written a Foreword to the book, and in it he states that he believes the work will be a useful contribution to a clearer understanding of the North Atlantic Community. In this belief he is surely well justified. As Dr. Farran points out, the North Atlantic Treaty is not only concerned with military defence. It is too often forgotten that the Treaty also expresses the purpose "to safeguard the freedom, common heritage, and civilisation of their peoples, founded on the principles of Democracy, individual liberty and the Rule of Law . . . by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded." The author is here concerned solely with the non-military aspects of NATO. His aim is not to provide a book of use only to lawyers, but to try to fill the needs of the ordinary educated reader in any of the fifteen Atlantic states, who wishes to know more about the constitutional systems of other countries within the alliance. Dr. Farran's thesis is that we are all members of one Atlantic Democracy, and that therefore we must strengthen this Democracy by a full appreciation of all the advantages that accrue to its peoples over those of members of the Communist world.

Within the modest limits he has set himself, the author has achieved considerable success. In a remarkably short space he has provided a useful sketch of the salient characteristics of the constitutions of each of the fifteen member countries. Of course much of the detail he gives concerning France is out of date now, but it was correct at the date of publication. Dr. Farran was not to know that the French Constitution of 1946 was to prove so short-lived. But even this change does not affect the soundness of his basic thesis. Most of the book is devoted to a study of the fifteen Legislatures, and their relationships with the people and with the Executives. The author finds that Parliamentary democracy is the key to all the constitutions. The Executive is usually responsible to the Legislature, which is directly elected by the people. Exceptions to this rule (and discounting the new French position) are the United States, Iceland and Portugal, though even there the Governments would fail if the Legislatures did not provide the necessary grants and legislation. Uniformity throughout all fifteen countries is neither necessary nor even desirable, provided certain basic values and concepts are upheld by all. These the author consistently brings to the fore, and as examples it may suffice here to mention that all the NATO countries observe the principles of the secret ballot and of "one man, one vote." Again Dr. Farran considers that a minimum of two political parties is needed in each country. On this score he is bound to criticise Portugal, though he is careful to remind the reader of the very potent historical reasons for the Salazar régime. In the course of ten short chapters, the author examines the various chambers of the Legislatures, the electoral systems, the legislative process, the Executives, the distribution of powers, and the position and powers of the Heads of State, both monarchical and republican. Some striking differences emerge, greatest of all probably being the real powers enjoyed by the United States President (and perhaps the President of France now?) on the one hand, and the far more formal character of other Heads of State. But again the most important factor to emerge is the great basic similarities between all the countries at all points. To use Dr. Farran's own words, in all NATO countries the "power is from the people," and this is the great strength of the Atlantic Democracy. The last two chapters are concerned with the judiciary and the constitutional liberties of the subject laid down in some countries. The latter he considers to be useful guides, but of little real weight unless power truly is from the people. Clearly the author would not feel that there was any compelling reason why the United Kingdom should attempt to enact a Bill of Rights, as has been suggested in some quarters, or even the Commonwealth, as has been suggested in others. Because power really is from the people in the Atlantic Democracy we can see the greatest difference between the NATO countries and the so-called Peoples Democracies. Once more we receive a salutary reminder of the message that Orwell gave us in *Animal Farm*, when he dealt with the laws of the animals.

On this encouraging note the book ends. Dr. Farran is to be congratulated, both on his service to the NATO Community, and on providing in a handy form a neat and useful comparative account of the constitutions of the NATO countries.

D. C. M. Yardley.

Freedom in a Federal World. Revised second edition. By E. L. Millard. [New York: Oceana Publications, Inc. 1961. 234 pp. $3.95.]

This book has not one author but more than four hundred. It is a report of discussions among students of world affairs in the Conference upon Research and Education in world government ("CURE"). Consequently, nearly every sentence appears in quotation marks and begins a new paragraph. Everywhere there is an epigrammatic superficiality, couched in florid language. But

for the patient tolerant reader there is, nevertheless, much food for serious thought.

The book has a tripartite theme or proposal: the conversion of the United Nations into a world federal institution, the holding of a Charter Review Conference, and the creation of an Assembly of Peoples as an additional organ of the United Nations. "World peace does not require a world super-government: it needs an international federal government, with direct relation to the individual citizen, but acting in fields largely outside the sovereignty of established nations. A federal government at the world level will mean an international 'buffer state,' limited to a few specific jurisdictions which are necessary and effective in keeping the peace, and leaving to the nations all other powers" (p. 9). Do world federalists optimistically believe that international jurisdiction and domestic jurisdiction can be so easily distinguished? The difficulties of interpreting Article 2 (7), particularly over matters of human rights and internal strife, ought to have dispelled these naive illusions.

Federalists seize on EEC as a shining example of federalism. But is it accurate to speak of EEC as a federation in which "the concept of national sovereignty has lost most of its meaning" so long as the member states continue to conduct their own foreign affairs and defence policy? And is there any danger that regional groupings might positively hinder world federalism? The doctrinaire federalist approach to world problems is unconvincing. "The truth is that world government, though a genuinely noble ideal, cannot be a remedy for the world's divisions, because the very existence of these divisions makes its realisation impossible. But the situation is, in a sense, worse than this. Aiming at world government is now, in my opinion, actually wrong. It distracts our attention from what we ought really to be doing, which is to search for ways of living safely in an inevitably divided world." (Sir William Hayter, *Observer*, February 12, 1961.)

The process of "re-interpretation" of the "implied powers" of the Charter, as manifested in the Uniting for Peace Resolution 1950 (which was not the basis on which the Korean war was fought (p. 45)), is considered unlikely to produce that gradual evolution and constitutional flexibility necessary to progressive institutions. What is needed is the holding of the Charter Review Conference as provided for in Article 109. This will only take place if world public opinion demands it, and even the U.S.S.R. would not refuse to participate in such circumstances. Once the conference does take place "it may go well beyond the goals assigned to it. This is the mutation, the sudden blaze of development, which Federalism foments" (p. 50).

Having regard to the frustrations of the veto, the increasing moral stature of the General Assembly, and the undeniable force of world opinion, the world federalists suggest that the United Nations should be converted into a bicameral institution by the creation of an Assembly of Peoples directly elected by a world electorate. The danger of such an assembly being dominated by the coloured and poor peoples of the world is to be met by a system of complicated vote weighting against the bigger countries like China and India; the danger of demagogy in an irresponsible assembly convened to mobilise world opinion is not met. Surely it is not universal suffrage but political agreement between the Great Powers that is the key to world peace?

The book contains a number of other suggestions, of varying practicability, designed to divert attention away from nationalism towards world federalism. Vastly improved schemes for economic aid should be channelled through an enormous all-embracing UNESCO so as to reduce the competition for economic spheres of influence between the Great Powers; Lord Boyd-Orr said that most people prefer four sandwiches to the four freedoms (p. 194). The Trusteeship Council should directly govern trust territories; and the high seas and strategic waterways should be vested in the United Nations so as to control oil pollution and the dumping of atomic waste. Federalists believe that disarmament will not be possible until world government has been achieved.

A discussion outline drawing attention to the main controversies of each chapter is provided; and the appendix contains a most interesting New Draft for a Revision of the Charter.

ALEC SAMUELS.

AN INTRODUCTION TO THE HISTORY OF THE LAND LAW. By A. W. B. SIMPSON, M.A., Fellow of Lincoln College, Oxford. [London: Oxford University Press. 1961. 276 and (indices) xx pp. 25s. net.]

THE publication of a new book on this subject is indeed an event worthy of special comment. Mr. Simpson, who is to be congratulated on his courage and industry in tackling such a subject, claims that the book has been written to "replace" Holdsworth's *Historical Introduction to the Land Law*, and, no doubt it will, as the older book has for some years been out of print, and the subject is one of those which should be treated afresh at least once every generation. In its display of learning and the depth with which the book deals with its subject-matter, it is certainly a worthy successor to *Holdsworth*—indeed, it is better documented, more detailed and in some ways more erudite than its predecessor—but it is doubtful whether it will *replace* the older work. The advanced history student or the post-graduate with a reasonable legal grounding and specialising in legal history will find the book invaluable, but it is not, and does not purport to be, a new edition of *Holdsworth*, and it is in no sense an introduction to the modern law.

The learned author is "not sure that the heavy emphasis on history at an early stage in the teaching of modern property law is entirely admirable"; he would wish students to "read history as history and law as law." We must confess to prefer a more old-fashioned approach, and are of the opinion that a clear historical account, without too many digressions into difficult topics (such as the details of the old rules of inheritance) is an essential prerequisite to the proper understanding of the modern land law. The late Professor Harold Potter always taught the subject in this way, and so did the late Professor Hargreaves, with a somewhat different slant, as is to be seen in his "Introduction," and the divorce of law from history may lead we feel, to a lack of comprehension of basic legal principles. After all, as Mr. Simpson rightly says in his closing sentence (see p. 261): "For all the legislative interference which it has suffered the law of property continues to display an extraordinary measure of historical continuity."

Within the terms of his own brief—and the wording of the title of this new book has obviously been drafted with care—Mr. Simpson has produced an excellent piece of scholarship. At times, unfortunately, his style is not of the best, as is evidenced by the repetition of the odd phrase "the very beginning" on p. 68, and the use of such an expression as "any sort of inroads," on p. 228. Has "definition" an adjectival form (p. 47, note 1), and should not "parole," where it means "verbal," be spelt without the "e" (see p. 234)? We would also have preferred a clearer system of sub-headings; for example, it is not at first clear that the paragraph commencing on p. 20 is *not* about "escheat and forfeiture" but refers back to the main discussion of the chapter.

On matters of substance, it seems from several references that Mr. Simpson is of the opinion that a leaseholder in the fifteenth century enjoyed "seisin," though not, of course, of a freehold interest. There are several passages in the texts justifying this view, but it is clear by Coke's time (see, *e.g.*, Co.Litt. 48b) that "seisin" was used only in relation to an estate of freehold. Whilst not disagreeing with the statement on p. 78, to the effect that the leaseholder was "seised" in the fifteenth century, we think that such an unqualified assertion may be confusing to the uncritical reader. In the later law the "beatitude" of seisin became so important that students

certainly must not be assisted to get their thoughts on the subject confused. This point has been mentioned here, not so much in criticism of the author's views, as to emphasise the danger of giving a book such as this to the immature student (for whom, as Mr. Simpson would probably agree, it is not really designed). At times too, on a somewhat hasty first reading, the text seems somewhat confusing. Thus, was burgage a tenure, or was it a mere collection of special customs attaching to particular parcels of land? The distinction between services and feudal incidents is not clearly brought out in Chapter 1, and no precise explanation seems to be given anywhere of what was meant by a "real action," although there is, of course, a great deal of discussion of the various procedures. The use and the statute of 1535—almost the law student's *pons asinorum*—does not make its debut until comparatively late in the book (p. 163); historically, the treatment of this topic is sound, but we would have expected some earlier mention of the use when the doctrine of estates is first discussed.

All these comments relate rather to style and arrangement than to content. So far as the latter is concerned, Mr. Simpson is very difficult to fault. Many matters, such as the rise of the entail and the destructibility of contingent remainders are dealt with in a very interesting yet detailed manner; indeed, it might almost be said that the more abstruse the topic, the more the light that is shone upon it by this book. Mr. Simpson has clearly made the fullest possible use of all available sources even (for example) checking a quotation from *Hansard* against Campbell's *Lives of the Justices* (see note 7 on p. 249).

On p. 245 the learned author says "new species, not new genera," may be added to the incidents of property, when he is discussing the nature of easements and similar rights. Perhaps the rights that result from an application of the doctrine prohibiting derogation from grant (as in, for example, *Aldin* v. *Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437) may be classed within the genus easement (or, to apply the phraseology of section 1 of the Law of Property Act, 1925, "easement, right or privilege"), but into what genus does the deserted wife's licence fall? Even ownership of a legal estate does not always confer the same incidents in different circumstances; compare the position of the "ordinary" fee simple owner with that of a highway authority (*Tithe Redemption Commission* v. *Runcorn U. D. C.* [1954] 2 W.L.R. 518), or of a public authority holding their legal estate under statute for some specific purpose (*British Transport Commission* v. *Westmorland County Council* [1957] 2 W.L.R. 1032). It is for these reasons that it is perhaps a trifle unfortunate that the learned author has seen fit to bring his account of the history of the land law to a close with the property legislation of 1925. Since that date there have been far-reaching developments in the field of public control of land use, and land ownership certainly does not mean, in terms of the rights that may be enjoyed by a legal estate owner, what it did fifty years ago when Dicey was writing about the "Paradox of the Land Law" (see p. 260).

As might be expected of the Oxford Press, the production of the book is excellent; we found only one printer's error (p. 110, line 7), but the Index is not really full enough, and the reference to "gavelkind" therein should be to p. 21, not p. 22. The work is not included in the Clarendon Law Series, although it might well have been, as it has most of the characteristics, including format, of that now well-known series.

In conclusion, we would unreservedly recommend the book to the more advanced or mature student. It is said to be designed for those students whose interests are primarily historical, but it is also legitimately claimed that "the emphasis throughout is on legal doctrine," and there is no doubt that a student's historical interests must be firmly based on the law for him to enjoy a ready comprehension of the text. The price of the book is very reasonable for its size under modern conditions.

J. F. Garner.

Terrell & Shelley on the Law of Patents. Tenth edition. By K. E. Shelley, Q.C. [London: Sweet & Maxwell, Ltd. 1961. liv and 603 and (index) 56 pp. £6 6s. net.]

During the decade which has elapsed since the previous edition of *Terrell & Shelley on Patents*, it appears from the table of cases that there have been upwards of two hundred new decisions affecting the law of patents. Nevertheless, it would not appear that there have been any changes of the law of real substance. The editor, in his Preface, refers to decisions on "obviousness." The case of *Allmanna etc.* v. *Burntisland Shipbuilding Co., Ltd.* (69 R.P.C. 63) followed by the decision of the House of Lords in *Martin* v. *Millwood, Ltd.* ((1956) R.P.C. 125), finally put an end to the contention that, where the defence was one of obviousness, the same rule applied as in the case where the defence was prior publication, namely, that if the defendant relied upon earlier written disclosures only, the conclusion of obviousness must be derived from a single document. The true test is whether, at the date of the invention, the invention was obvious to any person skilled in the art and having all the knowledge then available. This is an objective test, and the fact that the invention was not obvious to the inventor himself is irrelevant. In another case where the question of obviousness was in issue, the Court of Appeal pointed out that this was a matter which the Appellate Tribunal could decide for itself, since it was not generally a matter depending upon the credibility of witnesses.

By a curious coincidence, a number of decisions of interest seem to have related to fountain pens. Reference has already been made to the *Ball Point Pen* case—*Martin* v. *Millwood, Ltd.* In *Fomento, Ltd.* v. *Selsdon Fountain Pen Co., Ltd.* ((1958) R.P.C. 8) where, under a licence agreement, the licensees undertook to give to auditors all such information as might be necessary to enable the amount of royalties to be ascertained, it was decided that the auditors were entitled to information to enable them to judge whether articles supplied by the licensees were covered by the patent subject to the licence or not, and not merely to information relating to figures. In *Terrell* v. *Mabie Todd & Co., Ltd.* (69 R.P.C. 234), the court held that an undertaking by a licensee to use its best endeavours to exploit an invention relating to pens meant that it must do what it could reasonably do in the circumstances. In *Mentmore Manufacturing Co., Ltd.* v. *Fomento, Ltd.* (72 R.P.C. 157), the Court of Appeal dealt with a question which seems often to arise in recent years, namely, the nature of "malice" in an action for injurious falsehood. Upjohn J. said that if it were proved that the defendant had made a statement not believing it to be true, and with the object of damaging a rival, this would clearly be a case of injurious falsehood.

But, in truth, it would seem that there has been less development in this branch of the law during the last decade than has been the case in other branches. There has been, perhaps, a falling off in the intensity of patent litigation. Modern developments of industry have involved that more importance is often attached to the "know how" of setting up and operating a method of manufacture than to the patentable elements. But such "know how" is not protectable as a right known to the law. It must be protected, if at all, by contract or under the law relating to secret processes and breaches of confidence. Often, however, it is found that the expense and delay of "tooling up" before any new invention comes on the market is such that the first in the field has obtained such a start over competitors that infringement would not be worthwhile, quite apart from the legal position.

Again, a number of good ideas which arise in modern conditions are not such as to be capable of legal protection at all. They often fall somewhere between the protection afforded by the law of copyright, and that protected by the law of patents. The former has no doubt been extended to cover such things as football league fixtures and commercial advertisements, but still

requires a literary or artistic form. Patent law, on the other hand, requires a method of manufacture. As an example, a number of cases are cited in *Terrell & Shelley* at p. 15 where patents have been refused for agricultural processes. The difficulty is that a method of securing that plants or animals develop by their natural processes in a more profitable manner is not a method of manufacture. It will be recollected that an attempt to obtain a similar protection by another means, namely, by the registration of names of new roses under the Trade Marks Act also failed.

All practitioners in the field of industrial property have the experience of having to tell clients that, although their ideas may be original and useful, they are not capable of protection. Apart from ideas of an industrial or agricultural character, one has ideas relating to such matters as a new television game, a method of keeping accounts for a particular industry, a new form of notation for music or choreography, and even a new form of football pool. While it may well be that it is unreasonable to give legal protection to some of these ideas, there does seem a case for considering whether it is not in the public interest to give a short term of protection for the encouragement of new ideas which may be of advantage to the community, but will not be developed unless industry can see an opportunity of recovering the costs of development.

Finally, congratulations must be given to the publishers and editor for the formal rearrangement of the book. The use of cross-headings in different types of print, the variations of the page headings, to indicate what part of each chapter has been reached, and the general rearrangement of the book so that the relevant material can readily be found, are of great advantage to practitioners.

F. E. Skone James.

Industrial Law. Sixth edition. By H. Samuels. [London: Sir Isaac Pitman & Sons, Ltd. 1961. xviii and 205 pp. 21s. net.]

In this small book the author attempts to cover a surprisingly wide field of law in very brief compass, and the number of editions and reprints testify to the popularity of his work. He has, however, been notably more successful in presenting a useful selection and abridgment of statutory provisions than in his handling of case law or in the more detailed work of editing.

The first page of the text provides examples of the uneven quality of his performance. The reader is told that an indenture is essential to the formation of a contract of apprenticeship despite the fact that the Court of Appeal in *Macdonald* v. *Twiname* ([1953] 2 Q.B. 304) (which is cited in a footnote) approve as the better modern view the sufficiency of simple writing. There is a misspelt case name (*R.* v. *Arnesby*), two incorrect case references and no consistent rule of practice in regard to giving the dates of pre-1865 cases. These latter points may be more vexatious than substantial but misspelled case names and unsatisfactory references are so frequent that much attention should be directed to them in preparing future editions.

Similar blemishes may be found on many of the following pages: At p. 3 the words in line 14 " . . . whether the apprentice has performed his obligations . . . " should read " . . . whether the master has performed his obligations . . ." At p. 4 it might be indicated that it is commonly accepted that the Law Reform (Frustrated Contracts) Act, 1943, has abrogated the rule in *Whincup* v. *Hughes*. The definition of an agent at p. 7 fails to indicate that an agent's chief purpose is to create legal relations between his principal and a third party, and that a servant may be simultaneously an agent in civil law. The statement at pp. 15–16 about non-deduction of income tax from damages for wrongful dismissal is incorrect in the light of *British Transport Commission* v. *Gourley* ([1956] A.C. 185) and *Phipps* v. *Orthodox Unit Trust* ([1958] 1 Q.B. 314), neither of which cases are cited. The statement at p. 17

that the voluntary winding up of a company does not act as a discharge of its employees is unsatisfactory. This seems to be the rule only when the winding up is for the purpose of amalgamation. The contrary rule seems to hold in the case of insolvency. See *Fowler* v. *Commercial Timber Co.* ([1930] 2 K.B. 1). The amounts of £25 and £50 given at p. 18 for which wages are a preferential debt are incorrect. Section 33 of the Bankruptcy Act, 1914, was amended by unrepealed provisions of the Companies Act, 1947, to bring the two amounts up to £200. The reference at p. 26 to section 93 of the Companies Act, 1929, should now be to section 108 of the Companies Act, 1948. The sentence on p. 28 dealing with a master's liability for the criminal acts of his servants is an inadequate statement of the position in criminal law, for which the first two cases cited—*Collman* v. *Mills* ([1897] 1 Q.B. 396) and *Barker* v. *Levinson* ([1950] 2 All E.R. 825)—are authorities, but would be acceptable if it refers to civil liability for which the third case cited, *United Africa Co.* v. *Saka Owoade* ([1955] A.C. 130), is an authority. If the sentence is intended to refer to vicarious liability in crime it should be indicated that, broadly speaking, this liability arises in connection with a limited number of statutory offences and not over the field of crime generally. *Alton* v. *Midland Railway* ((1865) 19 C.B.(N.S.) 213) cited at p. 29 turned on a point of pleading and could very well be dropped. See *Taylor* v. *M. S. & L. Ry.* ([1895] 1 Q.B. 134).

Although, as has already been remarked, the author is more successful in his treatment of statute law than of common law, his handling of the Factories Acts is not flawless. Thus, the two Scottish cases on bottle-washing cited at p. 55 to elucidate the definition of a factory have been reversed by section 151 (1) (iii) of the 1937 Act, as has *Paterson* v. *Hunt* ((1909) 101 L.T. 571), cited at the same page on rag sorting, by section 151 (1) (ii). Section 151 (5) cited at p. 56, as dealing with premises adjacent to quarries and mines, has been repealed by the Mines and Quarries Act, 1954, s. 189. Two interesting and fairly recent cases on the status of canteens which might have been cited on the same page, p. 56, are *Luttman* v. *I.C.I.* ([1955] 1 W.L.R. 980) and *Thomas* v. *British Thomson-Houston* ([1953] 1 W.L.R. 67).

Turning to the discussion of fencing provisions it will be found that faults of omission loom larger than faults of commission, despite the fact that at p. 66 *Caswell* v. *Powell Duffryn* ([1940] A.C. 142) is ignored, and one is told that the defence of contributory negligence cannot be set up against a civil claim for breach of statutory duty. Granted that it is necessary to select from an enormous mass of cases, still cases so important as *Nicholls* v. *Austin* ([1946] A.C. 493), *Carroll* v. *Andrew Barclay* ([1948] A.C. 477) and *Bonnington Castings* v. *Wardlaw* ([1956] A.C. 613) should not have gone unmentioned, and space might have been found for the interesting conflict between *Hoare* v. *Grazebrook* ([1957] 1 W.L.R. 638) and *Lewis* v. *High Duty Alloys* ([1957] 1 W.L.R. 632) on whether machinery not in itself dangerous but rendered dangerous by proximity to other machinery or material can be said to be dangerous for the purposes of the fencing provisions. A few words at p. 69 explaining the construction put on the words "properly maintained" in *Galashiels Gas Co.* v. *O'Donnell* ([1949] A.C. 275) might have assisted the uninstructed reader.

It is difficult to believe that any court at the present day would uphold the proposition for which *Saxton* v. *Hawkesworth* ((1872) 26 L.T. 857) is cited at p. 97, namely, that the employment in a particular job of an insufficient number of employees in proportion to the risks does not amount to negligence. This would seem a clear instance of unsafe system. The case was in fact decided on the ground of *volenti*. The two recent decisions of the House of Lords in *Davie* v. *New Merton Board Mills* ([1959] A.C. 604) and *Cavanagh* v. *Ulster Weaving* ([1960] A.C. 145) deserve treatment in the text rather than passing footnote references, which do nothing to bring out their real bearing on the law. *Wilson* v. *Tyneside Window Cleaning Co.* ([1958] 2 Q.B. 110) would also appear to be worth space.

In the chapter on trade unions two more minor points arise. First, section 440 of the Income Tax Act, 1952, which gives certain exemptions from income tax in respect of union income devoted to provident benefits does not refer to Schedule A, contrary to the statement at p. 140, since there is now no Schedule A income which falls within the expression "interest and dividends." *Duke* v. *Littleboy* ((1880) 49 L.J.Ch. 802) cited at p. 133, seems to have been overruled by the House of Lords in *Yorkshire Miners' Association* v. *Howden* ([1905] A.C. 256).

The chapter dealing with schemes of co-operation and voluntary welfare is an interesting survey of a variety of topics highly relevant to the maintenance of good industrial relationships. It is, however, marred at the start because in the first footnote at p. 157 a long passage on *ultra vires* and pensions is said to have come from the judgment of North J. in *Henderson* v. *Bank of Australasia* ((1888) 40 Ch.D. 170). In fact, it consists of two passages from the judgments of Cotton and Bowen L.JJ. in *Hutton* v. *West Cork Railway* ((1883) 23 Ch.D. 654), which were in fact cited by North J. in *Henderson's* case. Since the *West Cork* case is far better known, as well as being of higher authority, it would have been much better to give the original source.

Three recent statutes which might have received brief treatment to justify the comprehensive claim of the book's title are the Mines and Quarries Act, 1954, the Agriculture (Safety, Health and Welfare Provisions) Act, 1956, and the Occupiers' Liability Act, 1957.

A sample of incorrect case names is given to indicate what importance should be attached to reform in this matter in the preparation of the next edition. It includes *Davidson* (*not Davis*) v. *Handley Page*; *Giblan* (*not Gibbon*) v. *National Amalgamated Labourers' Association*; *Gozney* v. *Bristol* (*not British*) *Trade and Provident Society*; *Merrifield, Ziegler* v. *Liverpool* (*not London*) *Cotton Association*; *K.* (*not R.*) v. *Raschen* and *Uxbridge Permanent Benefit Building Society* v. *Pickard* (*not Pickford*).

There is obviously a place for a work such as this, presenting a fairly elementary statement of the law in this field. The number of editions to which this book itself has run bears this out. Although the book has some merits of substance in its presentation of statute law, less waywardly erratic editing and a more satisfactory treatment of case law is necessary before it can be confidently recommended.

A. H. Hudson.

Twentieth Century Comparative and Conflicts Law. Legal Essays in honour of Hessel E. Yntema. [Leyden: A. W. Sythoff. 1961. xiv and 547 pp. No price stated.]

Hessel E. Yntema, for most of his life professor at the University of Michigan, is a man whose fame and influence do not rest on great textbooks or numerous monographs. His scholarship is intimate and unassuming; his contributions to the law and to learning are relatively few in number, but exemplary in character; it is his humanity which pervades his work. His is an inspiring personality which was bound to dominate his friends, colleagues and pupils as well as the spheres to which his academic activity was mainly directed, *viz.*, the conflict of laws and comparative law. The development of these branches of the law in the United States of America owes him an immense debt. Although in the Anglo-American world the habit has not yet become widespread, it was natural, therefore, that, when on January 17, 1961, Yntema reached the age of seventy, a *Festschrift* was dedicated to him.

No less than thirty-eight scholars from fifteen different countries have combined in the production of a work the size and quality of which are, indeed, commensurate to the stature of the recipient. To review it poses problems of some difficulty. The enumeration of thirty-eight names and titles would be too tedious and of little use for any reader. To discuss each of the

papers adequately or perhaps only shortly would far exceed the space available for the review of a work which, in the nature of things, primarily interests the specialist in Yntema's principal fields of study. To select a few contributions for elaborate inquiry is attractive to the reviewer, but misleading for the reader and unfair towards the other authors. Perhaps it is a not altogether unacceptable compromise if the eleven articles on the conflict of laws are singled out for particular mention.

The special part of the conflict of laws is introduced by a thoughtful article by Henri Batiffol on the future of domicile and nationality as points of contact on the Continent of Europe. It is followed by Nadelmann who argues very persuasively that our conceptions of jurisdiction "require re-thinking in the world of today" (p. 335)—but nobody knows better than he how difficult and perhaps even hopeless it still is to bring about a uniform reform of the law on the basis of rational arguments rather than national idiosyncrasies. Professor Egawa reports about the divorce of foreigners in Japan, while Professor Cavers gives interesting and at the same time very disappointing news about the rules on the proper law of the contract which are being proposed for "Restatement Second" now under discussion and which are far from progressive; it is to be hoped that Professor Cavers' temperate criticism will not be ignored. Professor Reese of Columbia University has a valuable article on the much neglected subject of agency in the conflict of laws; it is likely to merit the close attention of English students. Derenberg, one of the world's leading experts in the field, devotes a stimulating study to a variety of problems connected with the territoriality of trademarks and goodwill; as some English cases, not referred to by the author, show, these problems are of growing significance in a shrinking world and require and, perhaps, one day will receive international regulation. Finally there is an article by Kronstein on the extraterritorial effect of antitrust legislation in the case of export associations; he believes that these associations are not normally illegal provided that their "anticompetitive acts take place outside" the country to which the export is made (p. 445), but he does not define these acts: do they include sales?

The general part of the conflict of laws is represented by contributions which make heavy reading. This applies, in particular, to Moffatt Hancock's study of "the classificatory, the functional and the result-selective" approach to the choice-of-law problem; perhaps even his belief that the functional approach "is a familiar technique constantly used in the process of adapting old rules to new borderline cases," that "it is a sober, realistic approach" (p. 378), is a little audacious. The functional approach is also one of the dominant themes of Professor von Mehren's erudite article on *renvoi* (p. 389):

> "... such an approach seeks to analyse the implications for a given controversy of the various policies (including choice-of-law policies) held by the jurisdictions concerned with the underlying transaction."

It is too early to say how *renvoi* will really be assisted by this approach, but it is to be hoped that Professor von Mehren will soon be able to revert to the problem in much greater detail. It is not certain whether, although it also seems to favour the "functional approach," Professor Ehrenzweig's study of characterisation ("an unwelcome addition to American doctrine") is similarly attractive. This learned author sometimes gives the impression that he regards his task as a "debunking" one, though such a task is open to few only. He may be right in describing characterisation as a "moribund doctrine" (p. 395), "as an unnecessary and therefore potentially misleading progeny of obsolete doctrine" (p. 398), but in that case he must provide another solution of a problem which has worried some of our greatest judges and scholars. He believes the solution, ignored by all others, to be that characterisation is really nothing but "interpretation of the [municipal] rules invoked" (p. 399 and *passim*). It is difficult to see what this definition as elaborated in the article means, unless it refers by another name to what one already knows as

characterisation and its traditional solution. One would like to know, for instance, how Professor Ehrenzweig would have solved the two textbook cases of characterisation to which the National Bank of Greece has given its name, and upon which Professor Graveson touches in an article, somewhat surprisingly, called *Judicial Justice as a Contemporary Basis of the English Conflict of Laws*. It is to be hoped that Professor Graveson will continue to give his attention to the implications of "this very serious comedy" (p. 318), which his present study has not exhausted. Incidentally, readers will be interested in the following comment (p. 318):

> "Since the war of 1939–45, however, there has been manifest in the House of Lords a new spirit, a spirit not of legalism, but of justice, which tends not to confine the lower courts, but to liberate them from the too rigid application of rules of law and the too slavish of precedent and conceptual considerations."

There are, perhaps, some cases in the books which would seem to support a conclusion in the opposite sense.

F. A. Mann.

Prosecuting Officer. By Christopher Williams, Chief Constable of the Isle of Ely and Huntingdon. [London: Sweet & Maxwell, Ltd. 1960. 194 pp. 15s. net.]

Huntingdon has always struck me as a particularly agreeable and leisurely county, not merely by reason of its size, and now it looks as if it was by no means an unhappy place for a police officer either. To judge from this volume there is plenty of time for "baffled" Inspectors to discuss, pipe in mouth, with their "ponderous" Superintendent the intricacies of court work and the law of evidence, while the latter sits in a "capacious" chair behind his "paper-strewn desk" and "overflowing trays," "placing his finger-tips together" or "stroking his chin" with his "plump hands," before they both get away to their fishing or to the "deck-chair under the trees" in their gardens.

As for the Superintendent (a fictitious character, of course, I hasten to add), he knows enough law, if not perhaps to get him a chair at a university, at least to enable him to deal "airily" with all the questions the "baffled" Inspector can put to him, and the most striking thing which emerges from this book is perhaps the fact that there should be so many prosecutions involving issues of law conducted by the police themselves. Actually, the author states that he holds no views on the dispute whether police officers *ought* to prosecute, but simply notices that in fact they *do*, and this being so, he is right in saying that they ought to know what the law of evidence is. And, we may add, if a police officer is used to the kind of life described above, it will be readily understood that he "flinches from the weightier classics of the profession" and needs this kind of work which is based on pleasant dialogue in the study.

H. A. Hammelmann.

CORRESPONDENCE

The Editor,
The Modern Law Review.

Sir,

I should be grateful if you would permit me to answer Professor Anderson's reply to my article, "Retrograde Legislation in Northern Nigeria?" [1]

Professor Anderson's reply [2] presented the legislation as a much needed reform of the native Moslem courts. He did not suggest that there was need for the reform of what I have called the "British" courts. The new legislation, however, completely sweeps away the procedure of the "British" courts and sets up an inquisitorial system. How is the procedure of the native Moslem courts (according to Professor Anderson so greatly in need of reform) affected by the new legislation? The answer is found in section 386 of the Procedure Code, *viz.*:— "In any matter of a criminal nature a native court shall be guided in regard to practice and procedure by the provisions of this Criminal Procedure Code. (3) The fact that a native court has *not* been guided or properly guided by the provisions of this Criminal Procedure Code shall not entitle any person to be acquitted or any order of the court to be set aside." The foregoing demonstrates how much the presentation of the legislation as a bona fide reform is valid. I submit that whatever may have been the intentions of the protagonists of "reform" the effect of the legislation has been to destroy that which did not need destruction, but to leave legally intact that which cried out for radical treatment.

Professor Anderson writes that it "seems probable" that (the Penal Code) sections 136 and 137 refer only to documents of a formal character. Section 137 refers to documents but section 136 clearly refers solely to the attendance of a person at a certain time and place, and goes so far as to distinguish between a summons to attend court and one to attend before a public servant. Prima facie the section means what it says and, it is submitted, is an example of my contention that the Code is capable of being used as an instrument of repression. Professor Anderson writes: "It is certainly true, however, (although Mr. Price does not mention this) that section 150 of the Penal Code would provide a sanction for a refusal to answer questions put by the police or any other public servant." I reproduce section 150 verbatim: "Whoever being legally bound to render or furnish assistance to any public servant in the execution of his public duty intentionally omits to give assistance shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to £20 or with both."

In my submission, this section, which makes it an offence to fail to render assistance to a public servant, does not qualify the dangerous powers provided by sections 123 of the Procedure Code and 136 and 143 of the Penal Code. Section 143 makes it an offence to refuse to sign a statement, and section 136 to fail to attend when required, and section 150 to fail to render assistance. They constitute different duties and different offences and that is why they are embodied in different sections.

Professor Anderson agrees that the procedure in regard to the First Information Report may be regarded as undesirable, but justifies it on the ground that it is all to ensure that the accused gets a fair trial, and that in any case the magistrate can always get another magistrate to try the case.

[1] (1961) 24 M.L.R. 604.
[2] (1961) 24 M.L.R. 616.

I am sure that Professor Anderson's motives in recommending this legislation were of the highest, but I cannot credit that he really expects any practising member of the Bar to accept that it is in the interests of an accused person for the court which is to try him to be apprised before the trial of the suspicion against him (including possibly second or third hand hearsay which he is unable to cross-examine), and to be directing the prosecution's case as well as the police investigation. If it is necessary to get another magistrate to try the informations laid before the resident district magistrate that is pretty fair support of my contention, but how can a magistrate justify the obtaining of another magistrate to try the cases in his district because the suspicion of the police has been entered on the First Information Report when it is the very purpose of the Procedure Code that this shall be entered on the Report and shall be furnished to the court? In any case, what a delightful picture of general post among the magistrates of the Northern Region is contemplated when a magistrate at Ilorin must try the informations laid before the magistrate at Kaduna, several hundred miles away, and vice versa! I submit this is not practical for justice.

Moreover, if the purpose of this inquisitorial procedure is mainly to assist the accused in the preparation of his defence and ensure his fair trial, why is it that only the prosecution may call upon the magistrate for his direction as to how their case is to be proved, what witnesses are to be called and what documents are to be produced? Why is the defence not entitled to obtain the services of the same leader?

Professor Anderson criticises my standpoint that under the Procedure Code an accused has to show cause why he should not be convicted and refers to my argument as "a travesty of the facts." The following is an extract from the Procedure Code:

Section 156: "When the accused is brought and appears before the magistrate the particulars of the offence of which he is accused shall be stated to him and he shall be asked if he has *any cause to show why he should not be convicted.*"

Section 158 (1): "When the magistrate decides not to convict the accused under section 157, or when an accused *states that he intends to show cause why he should not be convicted* the magistrate shall proceed to hear the complaint if any and take all such evidence as may be produced in support of the prosecution."

Of course under the provisions of the Code a court may hold there is no case to answer after the prosecution's case has been heard and after making such examination of the accused for the purpose of enabling the accused to explain any circumstances appearing in the evidence of the prosecution (s. 159) (and this before he has given evidence), but this does not affect the general issue of the onus of proof; that is to say, whether or not the onus is on the prosecution *throughout* to prove its case beyond reasonable doubt or whether it is on the defence to show cause why the accused should not be convicted. For example, in a trial by judge and jury in this country a judge may well hold there is a case to go to the jury, *i.e.*, a case to answer, but he must nevertheless direct the jury when he sums up that it is the duty of the prosecution to prove its case and not for the accused to establish his innocence. If there is a doubt it must be resolved in favour of the accused—there is no question of the accused showing cause why he should not be convicted.

When sections 144 and 148 are considered with sections 156, 158 and 382, is it really a "travesty" to write that the effect of these sections is that if the accused denies the offence he has to show cause why he should not be convicted and the golden thread has been broken? Presumably, the expression "show cause why he should not be convicted" is used advisedly in sections 156 and 158. What is the natural and ordinary meaning of the words? If they do not mean what they say they constitute a singularly unfortunate description of the role of the defence. In any case, the words are almost a term of art, and

have long been accepted as having a very definite meaning, for example, see the O. XIV procedure in the *White Book*.

I contended that by the procedure laid down in the Code the charge is only framed after the prosecution's evidence has been called, and that effective cross-examination could only then begin.

Section 160 reads thus: "If when the evidence referred to in section 158 and the examination referred to in section 159 have been taken and made or at any previous stage of the case the magistrate is of opinion that there is ground for presuming that the accused has committed an offence . . . he shall frame a charge under his hand declaring with what offence the accused is charged and shall then proceed as hereinafter provided."

Section 162: "If the accused pleads not guilty he shall be required to state whether he wishes to cross-examine or further cross-examine any of the witnesses," etc.

I contend that it puts a substantial difficulty in the way of the defence if (a) there is no charge made until after the prosecution's evidence has been called, and (b) if the defence (and it may well be that a very simple man is defending himself) has (1) to cross-examine the prosecution witnesses before it is known what the charge is going to be and/or (2) has to have them all recalled for cross-examination after the charge has been framed. This would also appear to be a cumbersome, delaying procedure, not practical for justice.

I agree with Professor Anderson that section 156 provides that when an accused appears before the magistrate the particulars of the offence of which he is accused shall be stated to him. The section does not lay down at what stage this shall be done, and it is difficult to see how the particulars of an offence can be stated to a man if the offence itself has not been decided upon. That is putting the cart before the horse and is not practical for justice.

For a court to be allowed to convict without ever having a charge framed is, in my submission, retrograde, and to allow a native court in Northern Nigeria to do this is, in my submission, to court injustice.

I could reply in further detail to Professor Anderson but space limits me. Professor Anderson takes me to task for not having set out the whole of some of the sections quoted, and infers that by this method I have altered the natural meaning. I do not think that this has in fact occurred. The addition to the extract from section 389 from which I quoted adds very little. I included the extract to contrast it with the leading for the prosecution that the court may and shall do. At the same time, it may well be a most intimidating thing for a simple man, in the (to him) hostile environment of a court, to be asked to state his defence when he is charged and to reveal the names and addresses of his witnesses before they are called and before his defence is embarked upon. However, in view of this suggestion by Professor Anderson let me say that my article was submitted together with copies of the Codes and with an invitation for quotations to be verified.

Professor Anderson justifies the examining of an accused by the court before he is sworn in order to explain circumstances in the prosecution's case, by saying that this also is included to help the accused. What help really is it to an accused to be questioned about the prosecution's case before he has given his own evidence, his own explanations in his own words? I submit that such a course is the very one no judge should ever adopt—he should be patient, hear the accused's evidence and then ask him for his explanation of damaging pieces of the prosecution's evidence, if this has not already been done by the prosecutor in cross-examination. To fall upon an accused person with demands for explanations of circumstances shown in the prosecution's evidence before he has told his own story is likely, in my submission, to daunt the defendant and affect improperly the mind of the court. It is not fair.

The Codes are fundamentally a restatement of the Indian Penal and Procedure Codes by which we governed India, and which were drafted in 1834 by a commission under Lord Macaulay. The Sudan Codes follow them. This is 1961, and I submit that the Northern Nigerian Codes contain provisions which

should not be put upon a truly self-governing people. They are retrograde—1834 stuff. Moreover, the Nigerian Codes go further and are without the safeguards by way of confirmation and revision of proceedings which are contained in the Sudan legislation.

Professor Anderson kindly suggests that I have "fallen into the error into which so many English lawyers are prone to slip," etc. I have, of course, the greatest respect for Professor Anderson's erudition but I must make it clear that I wrote with some practical experience in the law and its practice in courts in Africa and this country. Against the background which I saw daily for several years in Africa until quite recently, and against the background of my daily circuit practice here, these Codes appear to me to be fraught with oppression. In my opinion the great legal need of the ordinary African in Nigeria is to be protected not merely from common criminals and breakers of the law, but from the tyranny and exploitation that is perhaps an inevitable remnant of a feudal system, and any legal system in Nigeria needs to be heavily weighted to secure the rights of the ordinary individual. The Procedure Code, in my opinion, is weighted against the ordinary subject and a ready weapon to the hand of oppression. I would add that those of my friends in daily practice on one side or the other in the criminal courts on my circuit who have seen the Code have been astonished by it.

I am, etc.,

Justin Price.

SPECIAL NUMBER—LAW REFORM

Vol. 24 No. 1 January 1961

THE MODERN LAW REVIEW

EDITORIAL NOTE 1
THE MACHINERY OF LAW REFORM *E. C. S. Wade* 3
MECHANICS OF LAW REFORM *Sir Noël Hutton* 18
SOME PROPOSALS FOR REFORM IN THE LAW OF EVIDENCE *Rupert Cross* 32
REFORM IN THE LAW OF CONTRACT *C. Grunfeld* 62
REFORM OF THE LAW OF RESTITUTION *Robert Goff* 85
SOME REFORMS IN THE LAW OF TORT *Glanville Williams* 101
EQUITY AND THE LAW REFORM COMMITTEE *V. T. H. Delany* 116
CONVEYANCING AND THE PROPERTY ACTS OF 1925 *G. A. Grove* 123
REGISTERED LAND REFORM *Gerald Dworkin* 135

STATUTES
Matrimonial Proceedings (Magistrates' Courts) Act, 1960 *O. M. Stone* 144
Caravan Sites and Control of Development Act, 1960 *Michael Mann* 150
Payment of Wages Act, 1960 *Olga L. Aikin* 155

REPORTS OF COMMITTEES
Departmental Committee on Human Artificial Insemination *Robert S. W. Pollard* 158

NOTES OF CASES
R. *v.* Byrne 164
Rogers *v.* Arnott 166
R. *v.* Collins 170
Société Franco Tunisienne D'Armement *v.* Sidermar S.P.A. 173
Webb *v.* Times Publishing Co. 178
Sowa *v.* Sowa 183
Williams *v.* Settle 185

REVIEWS
Klare: Anatomy of Prison 190
Agnelli: John Austin alle Origini del Positivismo Giuridico 193
Cattaneo: Il Concetto di Rivoluzione nella Scienza del Diritto 193
Preston & Newsom's Restrictive Covenants (3rd ed.) 194
Kaufman: Admissibility of Confessions in Criminal Matters 195
Greenberg: Race Relations and American Law 196
Paulsen (ed.): Legal Institutions Today and Tomorrow 198
Röhl: Fremde Einflüsse im Modernen Japanischen Recht 199
Stewart: Modern Forms of Government 200
Kahn-Freund: The Growth of Internationalism in English Private International Law 200
Blix: Treaty-Making Power 201
Rosenne: The Time Factor in the Jurisdiction of the International Court of Justice 204
Hambro: The Case Law of the International Court 205
Jenks: Human Rights and International Labour Standards 206
Schaps & Abraham: Das Deutsche Seerecht 206
British Journal of Criminology, Vol. 1 208

CORRIGENDUM 208

Published for The Modern Law Review Limited

A STEVENS Publication

Six Issues
1961 Subscription £2 5s. post free
Each 10s.

An Introduction to the

LAW and PRACTICE of BETTING and BOOKMAKING

The Englishman's right to "a little flutter" is regulated afresh by the Act of 1960—a most important piece of legislation which consolidates the law and sets new standards in the conduct of the bookmaker's business.

How does a bookmaker obtain a permit to operate? What are the registration requirements? How are the new betting offices to be conducted? What is the law affecting gaming? "Fruit machines"? Dominoes and cribbage? And indeed any "amusements with prizes"? And what are the penalties?

This book provides a guide to form over the whole field of this tricky legislation with its accompanying regulations, permits and licences. "It's a dead cert" that neither the bookmaker nor his solicitor can afford to be without CHENERY ON BETTING AND BOOKMAKING.

J. T. Chenery,
A Solicitor of the Supreme Court

Ready now *£1 15s. net (1s. 6d. postage)*

SWEET & MAXWELL

11 NEW FETTER LANE, LONDON, E.C.4